IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-450

ALEXANDER P. BUTTERFIELD, Administrator of the Federal Aviation Administration, *et al.*,
Petitioners,

—v.—

REUBEN B. ROBERTSON, III and JEROME B. SIMANDLE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA CIRCUIT

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RELEVANT DOCKET ENTRIES

PARTIES

REUBEN B. ROBERTSON, III
JEROME B. SIMANDLE

v.

1. JOHN H. SHAFFER, Administrator
   Federal Aviation Administration
2. FEDERAL AVIATION ADMINISTRATION
3. AIR TRANSPORT ASSOCIATION OF AMERICA
4. JOHN A. VOLPE, Secretary,
   Department of Transportation
5. DEPARTMENT OF TRANSPORTATION

1971	Sep. 30	Complaint, appearance; jury demand
1972	Jan. 31	Amended complaint
	Feb. 2	Motion of deft. #3 to dismiss and alternative motion to strike
	Feb. 9	Motion of pltffs. for preliminary injunction
	Feb. 14	Answer of defts. #1, 2, 4 and 5 to amended complaint
	Feb. 28	Opposition of pltff's to motion to dismiss and alternative motion to strike of deft.#3
	Feb. 29	Order extending time to March 10, 1972 to defts. to respond to motion for prel. inj. conditioned that defts. do not implement policy in letter dated Jan. 11, 1972; hearing on motion for prel. inj. continued to March 17, 1972 at 10:00 a.m. (N) (Signed 2-28-72) Waddy J.
	Mar. 15	Order extending time to April 10, 1972 to defts to respond to pltf motion for preliminary injunction with conditions hearing

on motion for preliminary injunction is continued from 3-17-72. (N) Waddy, J

Mar. 27 Order granting motion of deft. Air Transport Association of America to dismiss. (N) Waddy J.

Apr. 26 Withdrawal of pltfs. motion for preliminary injunction;

Apr. 26 Motion of pltfs. for partial summary judgment; exhibit 1 through 4;

May 19 Request of plaintiffs for admissions; exhibit 1 through 9

May 19 Interrogatories of pltfs. to defts.

May 19 Request of pltfs. for production of documents

June 1 Federal defendants cross-motion for & partial summary judgment and opposition to plaintiffs motion for partial summary judgment; affidavit of John H. Shaffer with attachments 1, 2 & 3; affidavit of John H. Shaffer with attachments 1, 2, 3, 4, 5, 6 & 7; exhibits A, B & C

June 21 Motion of Federal defendants for a protective order & stay discovery

June 29 Motion of plaintiffs to discover & opposition to defendants motion for a protective order staying discovery

Jul. 7 Response of defts to motion to compell discovery; affidavits

Jul. 12 Response of Federal defendants to plaintiffs statement of material facts as to which there is no genuine exhibit

Jul. 12 Reply memorandum by Federal Defendants affidavit (1)

Jul. 21 Recommendation granting motion for a protective order and to stay discovery; Assistant Pretrial Examiner

Jul. 26	Objections of plaintiffs to recommendation of pretrial examiner
Aug. 2	Reply of defendant to objections to pretrial examiners recommendations
Aug. 21	Motion of Federal defendants to dismiss or for summary judgment; affidavit;
Aug. 29	Supplemental request of pltfs for production of documents
Sep. 28	Response of Federal defendants to plaintiffs supplemental request for production of documents
Nov. 8	Order granting summary judgment as to count 1 & dismissing remaining counts. (N) Waddy J.
Nov. 27	Order staying to & including 12-12-72 order of 11-8-72 re SWAP reports; further stayed should federal defendants file a motion for further stay in USCA. (N) Waddy J.
Dec. 12	Notice of appeal by defendants from order of 11-8-72

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1970-71

REUBEN B. ROBERTSON, III
2234 Decatur Place, N.W.
Washington, D.C. 20009
202-833-3400

and

JEROME B. SIMANDLE
19 Agassiz Street
Cambridge, Massachusetts 02140
617-547-8235

against

JOHN H. SHAFFER
Administrator
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, D.C. 20590
202-655-4000

FEDERAL AVIATION ADMINISTRATION
800 Independence Avenue, S.W.
Washington, D.C. 20590
202-655-4000

AIR TRANSPORTATION ASSOCIATION OF AMERICA
1000 Connecticut Avenue, N.W.
Washington, D.C.
202-296-5800

JOHN A. VOLPE
Secretary
Department of Transportation
400 - 7th Street, S.W.
Washington, D.C. 20590
202-655-4000

DEPARTMENT OF TRANSPORTATION
400 - 7th Street, S.W.
Washington, D.C. 20590
202-655-4000

COMPLAINT

(Seeking orders under the Freedom of Information Act, injunctive relief for continuing *ultra vires* agency actions, and injunctive and treble damage relief for violations of the antitrust laws)

JURISDICTION AND VENUE

1. Plaintiff Reuben B. Robertson, III is a citizen of the United States residing at 2234 Decatur Place, N.W., Washington, District of Columbia, and is a person within the meaning of 5 U.S.C. 552 and 551(2).

2. Plaintiff Jerome B. Simandle is a citizen of the United States residing at 19 Agassiz Street, Cambridge, Massachusetts, and is a person within the meaning of 5 U.S.C. 552 and 551(2).

3. Defendant Federal Aviation Administration [hereinafter FAA] is an agency of the United States government within the meaning of 5 U.S.C. 552 and 551(1). Defendant FAA is a subdivision of the Defendant Department of Transportation and has its main offices in the District of Columbia.

4. Defendant John H. Shaffer is Administrator of the Defendant FAA. As Administrator he has ultimate responsibility for and control of the policies of Defendant FAA.

5. Upon information and belief, Defendant Air Transport Association of America [hereinafter ATA] is an unincorporated association of air carriers having its principal place of business in the District of Columbia.

6. Defendant Department of Transportation [hereinafter DOT] is an agency of the United States government within the meaning of 5 U.S.C. 552 and 551(1). Defendant Department of Transportation has its main offices in the District of Columbia.

7. Defendant John A. Volpe is Secretary of Defendant DOT. As Secretary he has ultimate responsibility for and control of the policies of Defendant DOT.

8. The agency records sought to be produced under those counts of this complaint relating to the Freedom of Information Act, 5 U.S.C. 552, are maintained by and under the custody of the Defendant FAA and are located in the District of Columbia.

9. Plaintiffs invoke jurisdiction of this court pursuant to the provisions of 5 U.S.C. 552, 5 U.S.C. 702, and 15 U.S.C. 4. Venue is proper under the provisions of 28 U.S.C. 1361 and 1391(b) and 5 U.S.C. 703.

COUNT I

(Orders for disclosure under the Freedom of Information Act)

10. During the months of July and August, 1970, in connection with a study of airline safety being conducted by plaintiff Simandle and others under the supervision of plaintiff Robertson, both plaintiffs and their agents and associates made repeated requests to Defendant FAA and its agents for the production of certain documents, known as Mechanical Reliability Reports [hereinafter MRRs] and Systemworthiness Analysis Program Reports [hereinafter SWAP Reports]. Such requests were made orally to agents of Defendant FAA on or about July 27, July 29, and August 5, 1970, with respect to the MRRs, and by letter of August 6, 1970, with respect to the SWAP Reports.

11. Defendant FAA, acting through its agents, refused to produce any of the above documents, formally denying plaintiffs' requests by letters dated September 28, 1970 in the case of the MRRs, and August 19, August 21, and September 28, 1970 in the case of the SWAP Reports.

12. Plaintiffs, in accordance with the procedures adopted by Defendant FAA, filed timely notice of administrative appeal, by letters dated August 26, 1970 in the case of the SWAP Reports, and October 27, 1970 in the case of the MRRs.

13. Defendant FAA, acting through its agents, formally denied plaintiffs' appeals by letters of February 24, 1971 in the case of the SWAP Reports, and April 1, 1971, in the case of the MRRs.

14. Plaintiffs have still not been allowed to inspect and copy the MRRs and SWAP Reports pursuant to their requests, all in violation of the Freedom of Information Act, 5 U.S.C. 552, which provides that such information shall be public and as such available for inspection and copying.

COUNT II

(Injunctive relief requiring the FAA to institute and follow reasonable procedures for the disclosure of agency records sought under the Freedom of Information Act)

15. Plaintiffs hereby reallege each and every allegation of paragraphs 1 through 14 above.

16. Defendant FAA and its agents, including Defendant Shaffer, are subject to and required to follow the Regulations of Defendant DOT entitled "Regulations of the Office of the Secretary: Public Availability of Information," 32 F.R. 9284, codified at 49 CFR Part 7.

17. Appendix C. paragraph 5, of the Regulations described in paragraph 16 above provides that requests for reconsideration of determinations not to disclose records and appeals from failures to disclose records shall be made to the Director, Information Services, of Defendant FAA, insofar as the requests concern records under the jurisdiction of the Defendant FAA. It is further provided that the decision of said Director is administratively final.

18. No officer with the title "Director, Information Services," as specified in paragraph 17 above exists within the Defendant FAA.

19. In place of such authorized officer as described in paragraph 17 above, Defendant FAA and its agents have substituted, without authorization according to law, an agent called "Director of Public Affairs." Said Director of Public Affairs, having assumed the functions of the

Director, Information Services, purports to decide requests for reconsiderations of determinations not be disclose records according to the authority granted the latter.

20. Upon information and belief, Defendant FAA and its agents, including the Director of Public Affairs, ignore and refuse to follow the procedures for decision-making in public information cases as provided in section 7.71 and Appendix C, paragraph 5, of the Regulations described in paragraph 16 above, and such decisions are made as a result of policy determinations made by Defendant Shaffer, sometimes before those seeking reconsideration have even filed their request for reconsideration and without consulting the memorandum in support required by section 7.71(c) of the regulations described in paragraph 16 above.

21. Defendant Shaffer, the chief policy-making officer of Defendant FAA, held a press conference on or about August 23, 1970, in which he stated publicly, *inter alia*, that he would refuse to allow inspection of MRRs because such inspection would be counter-productive."

22. Plaintiffs were at that time involved in seeking access to the MRRs discussed by Defendant Shaffer in the press conference described in paragraph 21 above, as set forth in paragraphs 10 through 13 above, and Defendant Shaffer's actions were intended to and did assure that plaintiffs requests were prejudged and determined without respect to their merits and without following the procedures described in paragraphs 16 and 20 above.

23. Defendant Shaffer, in response to a request from the Defendant ATA made on December 4, 1970, signed a "determination" dated February 18, 1971, that none of the SWAP materials would be made public.

24. Plaintiffs were at that time involved in seeking access to the SWAP Reports covered under Defendant Shaffer's "determination" described in paragraph 23 above, as set forth in paragraphs 10 through 13 above, and Defendant Shaffer's actions were intended to and did assure that plaintiffs' requests were prejudged and determined without respect to their merits and without

following the procedures described in paragraphs 16 and 20 above.

25. Defendant FAA has further a policy of discouraging plaintiffs and other members of the public from seeking access to information under the Freedom of Information Act. 5 U.S.C. 552, by taking inordinate and unreasonable amounts of time to process requests, notwithstanding that section 7.3 of the Regulations described in paragraph 16 above specifically provides that action should be taken "promptly." Thus, despite the fact that Defendant Shaffer made public pronouncement in August, 1970 that plaintiffs' requests for the MRRs would not be honored, plaintiffs were not officially informed of the rejection of their request until April, 1971, eight months after their request was made. Similarly, despite the fact that Defendant Shaffer signed a determination which had the effect of denying plaintiffs' request for the SWAPs in February 1971, plaintiffs were not officially informed of the denial of their request until March, 1971, seven and a half months after their request was made.

COUNT III

(Relief against violation of the Administrative Procedure Act)

26. Plaintiffs hereby reallege each and every allegation of paragraphs 1 through 25 above.

27. The actions of Defendant Shaffer described in paragraph 23 above with respect to the SWAPs constituted rulemaking within the meaning of the provisions of the Administrative Procedure Act, 5 U.S.C. 553 and 551(4) and (5).

28. Such rulemaking occurred without notice to interested parties, including plaintiffs, and without allowing the opportunity to such parties to participate through the submission of data, views or arguments, all in violation of the Administrative Procedure Act, 5 U.S.C. 553 (b), (c), (d) and (e).

COUNT IV

(Injunctive relief against *ultra vires* agency regulations)

29. Plaintiffs hereby reallege each and every allegation of paragraphs 1 through 28 above.

30. Defendant DOT has promulgated Regulations on Public Availability of Information, described in paragraph 16 above, "implementing" the Freedom of Information Act, 5 U.S.C. 552, which are followed by both Defendants and DOT and FAA.

31. Section 7.3 of these regulations, entitled "policy" and which is to form the ultimate basis for decision of disclosure requests provides, *inter alia*, that documents otherwise required to be made available under the Freedom of Information Act shall not be disclosed where secrecy will aid "the efficient conduct of public business."

32. Such a policy is entirely inconsistent with the fundamental policies of the Freedom of Information Act, and the promulgation of regulations including the language quoted in paragraph 31 above and based upon such a policy is entirely without statutory authority and is therefore completely *ultra vires*.

33. Defendant FAA has adopted its own guidelines based upon and "implementing" the Regulations described in paragraph 16 above. These guidelines are set forth in FAA Handbook 1200.2, Public Availability of Information, and "state basic policies and instructions governing the disclosure of FAA records to the public."

34. Chapter 1, section 1, of the FAA Handbook described in paragraph 33 above, entitled "policy," and which is to form the ultimate basis for decision of disclosure requests provides, *inter alia*, that documents otherwise available under the Freedom of Information Act shall not be disclosed where secrecy will aid "the efficient conduct of public business."

35. Such a policy is inconsistent with the fundamental policies of the Freedom of Information Act and the promulgation of guidelines including the language quoted in paragraph 34 above and based upon such a policy, is

entirely without statutory authority and is therefore completely *ultra vires*.

36. Section 7.85(b) of the Regulations promulgated by Defendant DOT and described in paragraph 16 above, which is followed by Defendant FAA, set forth, *inter alia*, a charge of fifty cents per page for the photocopying of public documents, with a minimum charge of one dollar.

37. The charges adopted as specified in paragraph 36 above bear no relation to the cost of photostatic reproductions, since the Defendant FAA makes similar photostat copying facilities available for the use of members of its staff doing private work for ten cents per page and the private firms doing similar photostat copying work in the Washington, D.C. area charge four to six cents per page.

38. The charges for photostatic reproduction set forth in section 7.85(b) of Defendant DOT's Regulations and described in paragraph 36 above, by virtue of their exorbitant cost, have the effect of discouraging members of the public from taking advantage of their right to copy public documents and are therefore entirely inconsistent with the fundamental policies of the Freedom of Information Act, 5 U.S.C. 552. The promulgation of such regulations is entirely without statutory authority and is completely *ultra vires*.

COUNT V

(Injunctive relief against purposeful misinterpretation of regulations)

39. Plaintiffs hereby reallege each and every allegation of paragraphs 1 through 38.

40. Defendant FAA and its agents have purposefully misinterpreted those parts of section 7.85 of Defendant DOT's Regulations, described in paragraph 16 above, pertaining to charges for copying and searches in order, by the charging of unauthorized fees, to discourage plaintiffs, their agents and associates, and other members of the public, from exercising their rights to gain access

to and inspect documents within the scope of the Freedom of Information Act, 5 U.S.C. 552.

41. Plaintiffs' agents were, during the months of July and August, 1970, required by the defendant FAA and its agents to pay "search fees," according to section 7.85 (a) of the DOT regulations described in paragraph 16 above, for information which was within the immediate knowledge of Defendant FAA's answering agents for which no search within the meaning of section 7.85(a) was required.

42. Defendant FAA, acting through its agents, attempted during the months of July and August, 1970 to require plaintiffs' agents to pay copying fees under section 7.85(b) before allowing examination of public documents, despite the fact that plaintiffs' agents did not wish to copy these documents but merely to inspect them as is their right under the Freedom of Information Act, 5 U.S.C. 552, and despite the fact section 7.85(b) does not and cannot authorize the imposition of fees for the mere inspection of available documents.

COUNT VI

(Injunctive relief against harassment of plaintiffs and their agents)

43. Plaintiffs hereby reallege each and every allegation of paragraphs 1 through 42.

44. During July and August, 1970, plaintiffs were involved in a study described in paragraph 10 above and Defendant FAA and its agents, knowing full well that public information in their possession was necessary to any meaningful investigation of the problems under consideration by plaintiffs, and knowing full well that due to the short period of availability of most of the students working on said study time was of the essence, caused certain of the agents of Defendant FAA, including Defendant Shaffer, to meet together or otherwise communicate on a number of occasions specifically to plan their conduct in order to frustrate as completely as possible plaintiffs' investigation.

45. On information and belief, Defendant ATA and its agents urged Defendant FAA and its agents not to cooperate with the study described in paragraph 10 above and not to provide access to plaintiffs and their agents to information to which they were and are lawfully entitled, and agents of Defendant ATA met with or contacted agents of Defendant FAA, while information requests of plaintiffs and their agents were pending, specifically to make such requests and to plan their conduct in order to prevent such access to requested information.

46. In pursuance of the conspiracy among the agents of Defendant FAA to prevent plaintiffs and their agents from gaining access to materials to which they were and are lawfully entitled, said agents of Defendant FAA attempted to and did harrass plaintiffs and their agents, refusing to provide relevant and legally public materials for inspection, attempting to impose unreasonable charges and fees, and following a policy of obstructive noncooperation, including yelling at and berating plaintiffs' agents and falsely accusing plaintiffs' agents of misconduct.

47. Defendant FAA and its agents, in pursuance of their policy of obstructive non-cooperation, specifically told plaintiffs agents that under no circumstances would plaintiffs' agents receive the cooperation of Defendant FAA or any of its agents, and Defendant FAA and its agents have continued to pursue their stated policy of non-cooperation with plaintiffs' legitimate investigations.

48. As a consequence of the policies and practices of defendant FAA and its agents described in paragraphs 44 through 48 above, plaintiffs have in fact been thwarted in their study and investigations and have not been able to complete such study, and are aggrieved thereby.

COUNT VII

(Injunctive relief and damages for violations of the antitrust laws)

49. Plaintiffs hereby reallege each and every allegation of paragraphs 1 through 48.

50. Defendant FAA has distributed and does distribute the MRRs described in paragraph 10 above to Defendant ATA and certain of its members.

51. Agents of Defendant FAA have informed plaintiffs' agents that distribution of these MRRs is made at the request of Defendant ATA and its members and that distribution of MRRs to members of the public is made only with the concurrence of Defendant ATA. When plaintiffs' agents attempted to inspect copies of MRRs on file with Defendant FAA, agents of Defendant FAA requested plaintiffs' agents to seek permission from Defendant ATA.

52. Information contained in SWAP Reports has been and is provided by Defendant FAA to Defendant ATA, to air carriers which are members of Defendant ATA, and their agents, and has been and is exchanged among members of Defendant ATA.

53. The MRRs, which involve material that the air carrier members of Defendant ATA are required by law to submit to Defendant FAA, and the SWAP Reports, which are based on information obtained by agents of Defendant FAA during the course of periodic inspections of records and facilities of air carriers required by law, contain information from various competing air carriers. Such information pertains to the safety record of each of the involved air carriers and various types of aircraft and is not only of great importance to the public safety but is of the nature to materially affect the competition between the various air carriers and between the various aircraft manufacturers.

54. Defendant FAA and its agents and the Defendant ATA and its agents and members have agreed to suppress the distribution of such competitive information and to prevent its distribution to plaintiffs and other members of the public. Such agreement is designed to and has eliminated competition between air carriers for improved safety records and amounts to a conspiracy in restraint of trade, in violation of the provisions of the Sherman Act, 15 U.S.C. 1.

55. Defendant FAA has contended and does contend that the material involved in the MRRs and SWAP Re-

ports is not public information but, on the contrary, is the private "proprietary" information of each of the various aircarriers, who submit it or who submit to inspections from which it is developed.

56. Distribution to competing aircarriers and aircraft manufacturers by agreement between the Defendant FAA and the Defendant ATA and certain of its members, of material such as that described by paragraph 53 above amounts to a conspiracy in restraint of trade, in violation of the provisions of the Sherman Act, 15 U.S.C. 1.

WHEREFORE, plaintiffs seek judgment against defendants:

(1) For Count I, an order requiring Defendant FAA to grant plaintiffs and their agents immediate access to the MRRs and SWAP Reports in question and an injunction requiring Defendant FAA to hereafter treat all SWAP Reports and MRRs as public information within the meaning of the Freedom of Information Act, 5 U.S.C. 552.

(2) For Count II, an injunction requiring the Defendant FAA to institute and follow reasonable procedures for making available agency records and information requested under the Freedom of Information Act and for administrative appeals of initial agency denials of such records and information; such an injunction would require Defendant Shaffer and his successors to cease prejudging requests for information and to cease interfering in the administrative appeal process set forth in the regulations, except insofar as the new procedures grant to the Administrator of Defendant FAA a specific role in such appellate process, and would require that the final appellate decision on a request for information under the Freedom of Information Act, 5 U.S.C. 552, be made in all cases within no more than 30 days of receipt by Defendant FAA of a formal letter of appeal or of a request for reconsideration of an initial denial of information.

(3) For Count III, an injunction prohibiting enforcement of Defendant Shaffer's "determination" of Febru-

ary 18, 1971, and forbiding Defendant FAA and Defendant Shaffer and his successors from making any further "determinations" except according to the procedures authorized by the Administrative Procedure Act.

(4) For Count IV, a judgment declaring null and void those portions of section 7.3 of Defendant DOT's regulations described in paragraphs 16 and 31 and of Chapter 1, Section 1 of Defendant FAA's Handbook described in paragraphs 33 and 34 which provide for nondisclosure of Freedom of Information Act information "for the efficient conduct of public business" and declaring null and void the fee schedule for photostatic copies set forth in section 7.85(b) of the above regulations of Defendant DOT; additionally, an injunction requiring Defendants DOT, Volpe, FAA, and Shaffer, to draft new regulations in conformity with such declaratory judgment and specifically requiring that any new fee schedule for photostatic copies of public documents shall require the payment of not more than the actual amount of the cost to Defendants FAA and DOT, as the case may be, per copy, except that such cost may in no event be more than ten cents per copy and that, in those instances where heretofore the Defendant FAA has distributed copies of such materials free of charge to Defendant ATA or certain of its members, no charge shall hereinafter be made to members of the public for the photostatic copying of similar materials, and in no instance may the Defendants impose a minimum charge other than that based upon the number of pages actually copied or require the copying of a minimum number of pages.

(5) For Count V, an injunction requiring Defendant FAA and its agents to cease requiring payment of excess and spurious fees and to cease requiring the payment of photostating charges before inspection of public documents is allowed; such injunction would also require Defendant FAA to notify, in writing, all persons who have been wrongfully charged fees by Defendant FAA and its agents within the past three years and to credit such wrongful charges against future charges of such persons for photostating, search fees, or other legitimate costs hereinafter accrued.

(6) For Count VI, an injunction prohibiting the Defendant FAA, Defendant Shaffer, and any other agents of Defendant FAA from conspiring or otherwise attempting to prevent plaintiffs or other members of the public from exercising their legitimate rights under the Freedom of Information Act, 5 U.S.C. 552, and prohibiting said Defendants from dealing with plaintiffs or other members of the public any differently from the manner in which they customarily deal or customarily have dealt with Defendant ATA and its agents and members.

(7) For Count VII, an injunction against Defendants FAA and ATA and their agents to prevent further conspiracies in restraint of trade and damages of thrice such loss as plaintiffs shall demonstrate resulted from the illegal conspiracies of Defendants FAA and ATA and their agents.

Plaintiffs further request that this court require Defendants FAA and DOT to display prominently, in that part of each Defendant's normal place of business or places of business to which members of the public seeking access to information of the sort involved in this complaint are admitted, a copy of the decree of this court for a period of one year from the date of the decree, that defendants be assessed all court costs and attorneys fees, and that the court order such further relief as to this court may appear just and proper.

/s/ David Bonderman
DAVID BONDERMAN
3012 Q Street, N.W.
Washington, D.C. 20007
202-337-9135
Attorney for Plaintiffs

DEMAND FOR JURY TRIAL

Plaintiffs demand trial by jury in this case for all issues pertaining to damages.

/s/ David Bonderman
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1970-71

REUBEN B. ROBERTSON, III, ET AL., PLAINTIFFS

v.

JOHN H. SHAFFER, ET AL., DEFENDANTS

AMENDMENT OF COMPLAINT

Plaintiffs hereby amend their complaint as of right under the provisions of Fed. R. Civ. P. 15(a) in the following respects:

(1) Paragraph 23, page 5, is amended to read:

23. Defendant Shaffer, in response to a request from the Defendant ATA made on December 4, 1970, signed a "determination" dated February 18, 1971, that none of the SWAP materials would be made public, and, upon information and belief, Defendant Shaffer signed a similar "determination" not to release MRRs submitted by ATA member air carriers on November 23, 1971, during the pendancy of this lawsuit.

(2) Paragraph 27, page 6, is amended to read:

27. Upon information and belief, on or about January 10, 1972, during the pendancy of this litigation, Defendant FAA and/or its agents or employees made a "final decision" regarding public access to MRRs and providing for the systematic destruction of original MRRs received by the FAA after February 18, 1972 and the elimination of information from the MRR summaries published by the FAA; at the same time, the Defendant FAA stated that its "determination" with respect to MRRs, described in paragraph 23 above, would be changed to comport with this new procedure.

(3) Paragraph 28, page 6, is amended to read:

28. The actions of Defendants described in paragraph 23 above with respect to the SWAPs and MRRs and in paragraph 27 above with respect to the MRRs constituted rule making within the meaning of the provisions of the Administrative Procedure Act, 5 U.S.C. 553 and 551(4) and (5), and such rulemaking occurred without notice to interested parties, including Plaintiffs, and without allowing the opportunity to such parties to participate through the submission of data, views or arguments, all in violation of the Administrative Procedure Act, 5 U.S.C. 553(b), (c), (d) and (e).

(4) Paragraph (3), page 13, is amended to read:

(3) For count III, an injunction prohibiting enforcement of Defendant Shaffer's "determinations" of February 18, 1971, and November 23, 1971, and forbidding Defendant FAA and Defendant Shaffer and his successors from making any further "determinations" except according to the procedures required by the Administrative Procedure Act; an injunction prohibiting said Defendants from effectuating the "final decision" referred to in paragraph 27 above or from taking any other action to destroy any documents involved in this litigation; and an injunction prohibiting said Defendants from taking any action to eliminate any information currently being included in the published MRR summaries.

CERTIFICATE OF SERVICE

I, James R. Michael, 1237 - 22nd Street, N.W., Washington, DC 20037, telephone (202) 785-0797, hereby certify that I have served a copy of the above amendment of complaint upon counsel of record for all Defendants this 31st day of January, 1971.

/s/ James R. Michael
JAMES R. MICHAEL

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1970-71

REUBEN B. ROBERTSON, III, ET AL., PLAINTIFFS

v.

JOHN H. SHAFFER, ET AL., DEFENDANTS

ANSWER OF DEFENDANTS DEPARTMENT OF TRANSPORTATION, JOHN A. VOLPE, FEDERAL AVIATION ADMINISTRATION, JOHN H. SHAFFER TO AMENDED COMPLAINT

First Defense

The Court lacks jurisdiction over the subject matter.

Second Defense

The complaint fails to state a claim upon which relief can be granted.

Third Defense

Defendants John A. Volpe and John H. Shaffer are not proper parties to this action.

Fourth Defense

Answering specifically the numbered paragraphs of the complaint, these defendants admit, deny and aver as follows:

1.-2. Lack knowledge or information sufficient to form a belief.

3. Admit the allegations of the first sentence of paragraph 3. With regard to the second sentence, admit that Defendant FAA is an agency of the Defendant Department of Transportation and has its main offices in the District of Columbia.

4. Admit the allegations of the first sentence of paragraph 4. The second sentence states a legal conclusion to which no response is required.

5. Lack knowledge or information sufficient to form a belief.

6. Admit.

7. Admit the allegations of the first sentence of paragraph 7. The second sentence states a legal conclusion to which no response is required.

8. Denied, except admit that the records are maintained by and in the custody of Defendant FAA.

9. Paragraph 9 states legal conclusion to which no response is required.

Count I

10. Denied, except admit that plaintiffs made oral requests for MRRs and SWAP reports and that a letter dated August 5, 1970 requesting MRRs and a letter dated August 6, 1970 requesting SWAP reports were received; and except that these defendants lack knowledge or information sufficient to form a belief concerning the truth of the allegations regarding a study conducted by plaintiffs.

11.-13. Admit.

14. Deny.

Count II

15. These defendants respond to each and every allegation in paragraphs 1 through 14 as stated above.

16. Denied, except admit that Defendant FAA and Defendant Shaffer are subject to and required to follow the Regulations of Defendant DOT entitled "Public Availability of Information," at 49 C.F.R. Part 7.

17. Deny.

18. Denied, except admit that no officer with the title "Director, Information Services" exists within Defendant FAA.

19. Denied, except admit that there is an official with a title "Director, Office of Public Affairs," who makes reconsiderations of determinations not to disclose records in accordance with paragraph 5, Appendix C, 49 C.F.R. Part 7.

20. Deny.

21. Lack knowledge or information sufficient to form a belief.

22. Deny.

23. Admit.

24. Deny.

25. Deny.

Count III

26. These defendants respond to each and every allegation of paragraphs 1 through 25 as stated above.

27. Denied, except admit that a letter dated January 11, 1972 regarding MRRs was sent from C. W. Walker, Deputy Associate Administrator for Operations, FAA, to the Air Transport Association. The Court is referred to that letter for a full and accurate statement of its contents.

28. Deny.

Count IV

29. These defendants respond to each and every allegation of paragraphs 1 through 28 as stated above.

30. Admit.

31. Denied; the Court is referred to the regulations cited for a full and accurate statement of their contents.

32. Deny.

33. Admit.

34. Denied; the Court is referred to the handbook cited for a full and complete statement of its contents.

35. Deny.

36. Admit.

37.-38. Deny.

Count V

39. These defendants respond to each and every allegation of paragraphs 1 through 38 as stated above.

40. Deny.

41.-42. Lack knowledge or information sufficient to form a belief.

Count VI

43. These defendants respond to each and every allegation of paragraphs 1 through 42 as stated above.

44. Deny.

45. Lack knowledge or information sufficient to form a belief.

46.-48. Deny.

Count VII

49. These defendants respond to each and every allegation of paragraphs 1 through 49 as stated above.

50.-56. Deny.

/s/ _____
HAROLD H. TITUS, JR.
United States Attorney

/s/ _____
JOSEPH M. HANNON
Assistant United States Attorney

/s/ _____
NATHAN DODELL
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Answer has been served upon plaintiffs by mailing a copy thereof to their attorney, James R. Michael, Esq., 1237 - 22nd Street, N.W. Washington, D.C. 20037, and upon co-defendant by mailing a copy thereof to its attorneys, George W. Wise, Esq., Timothy J. Bloomfield, Esq. and David B. Lytle, Esq., 815 Connecticut Avenue, Washington, D.C. 20006. Dated: February 14, 1972

/s/ _____
NATHAN DODELL
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 1970-71

RUEBEN B. ROBERTSON, III, ET AL., PLAINTIFFS

v.

JOHN H. SHAFFER, ET AL., DEFENDANTS

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs hereby move this Honorable Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, to enter an order of summary judgment in the Plaintiffs' favor under Count I of Plaintiffs' Complaint, as follows:

(1) requiring that Defendant Federal Aviation Administration ("FAA") grant Plaintiffs and their agents immediate access to all Mechanical Reliability Reports [hereinafter MRRs] and Systemworthiness Analysis Program Reports [hereinafter SWAP Reports] and;

(2) requiring that hereinafter Defendant FAA disclose all MRRs and SWAP Reports as required by the Freedom of Information Act, 5 U.S.C. 522, and make them available to the public on terms not more onerous than they are now and have been made available to Defendant Air Transport Association (ATA) and/or its members.

This judgment is sought on the ground that there is no genuine issue as to any material fact, and that Plaintiffs are entitled to such judgment as a matter of law. The motion is based upon the Plaintiffs' Complaint; the admissions in the Answer of the government Defendants regarding Count I of Plaintiffs' Complaint; the Memorandum of Points and Authorities in Support of this Motion for Partial Summary Judgment; and the Affidavit of

Plaintiff Reuben B. Robertson, III, and the attachments thereto.

Respectfully submitted,

James R. Michael
1237 - 22nd Street, N.W.
Washington, D.C. 20037
(202) 785-0797
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of April, 1972, I served a copy of the above Motion for Summary Judgment, together with the Points and Authorities in support thereof, proposed order, and Affidavit of Reuben B. Robertson, III, upon all counsel of record in this action, by depositing copies thereof in the United States mails, postage prepaid, addressed to said counsel at their addresses of record.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1970-71

REUBEN B. ROBERTSON, III, ET AL

v.

JOHN H. SHAFFER, ET AL

AFFIDAVIT

I, REUBEN B. ROBERTSON, III, being duly sworn on oath, depose and state as follows:

1. I am a consultant to the Center for Study of Responsive Law, Washington, D.C., and in this capacity have been responsible for conducting and directing studies of aviation safety, airline economics and operations, and the responsiveness of the Federal Aviation Administration to consumer, environmental and safety issues; I am also a founder and director of the Aviation Consumer Action Project (ACAP), which seeks to promote consumer and safety interests in aviation, and have served since November, 1970 as Chairman of the Consumer Advisory Committee to the Civil Aeronautics Board appointed by the CAB Chairman.

2. During the Summer of 1970, students working under my direction on airline safety studies requested access to various agency records maintained by the FAA concerning aviation safety and FAA surveillance of air carrier operations. The records to which we sought access included, *inter alia*, maintenance reports filed by air carriers pursuant to FAA regulations, known as Mechanical Reliability Reports ("MRRs"), and reports of FAA inspections and audits of air carrier operations and facilities, conducted pursuant to the agency's Systemworthiness Analysis Program ("SWAP"). These records were ultimately denied to us by the FAA in administratively final action, following which this litigation was

commenced. The FAA denial letters are appended to this Affidavit as Exhibits 1 and 2, respectively.

3. The MRR documents contain information that is required to be reported to the FAA concerning maintenance and safety defects and incidents experienced by commercial air carriers involving in-flight fires, fire warnings, engine shutdowns during flight, smoke and fume accumulation in the crew and passenger cabins, excessive cracks, corrosion or structural damage, fuel leakage or blockage during flight, landing gear malfunctions, and aircraft system malfunctions that require emergency actions in flight. Among other things, the information includes the name of the airline, aircraft type and registration number, the date, location and flight number of the incident reported, and the details and status of the defect, failure or malfunction.

4. From the information contained in the MRRs, it is possible to obtain current and historical trends concerning the operational safety and maintenance records of the various airlines and of the various aircraft types, which is needed for the completion of the above-mentioned studies of airline safety; in addition, it is my opinion that the MRR information is of great importance and potential utlity to consumers of air travel who are interested in maximum air safety and promoting beneficial competition among air carriers on the basis of superior safety in operation.

5. MRRs which are received from individual air carriers are compiled and published by the FAA in a daily MRR summary. The daily summaries, which include reports in both "open" and "closed" status, are furnished by the FAA to numerous air carriers, trade assocations (including the Defendant Air Transport Association), labor organizations, aircraft manufacturers and others, and are widely distributed within the aviation community. A typical MRR daily summary is attached as Exhibit 3 to this Affidavit.

6. The SWAP reports sought by plaintiffs are developed by FAA personnel in the course of regular and special visitations to the facilities of air carriers and reviews of their procedures and operations, particularly

with regard to maintenance and safety matters. It is my information and belief that the results of SWAP evaluations, which purport to identify and document specific defects and shortcomings in the safety and maintenance system of air carriers, are provided to and discussed in detail with the air carriers and are widely disseminated and discussed throughout the airline industry. Exhibit 4 attached hereto contains excerpts from a typical SWAP report of one of the major air carriers and demonstrates the nature and purposes of these reports.

/s/ Reuben B. Robertson, III
Reuben B. Robertson, III

Subscribed and sworn to before me this 24th day of April, 1972.

/s/ Connie Jo Smith
Notary Public

My Commission Expires:

January 14, 1977

EXHIBIT 2

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

Washington, D.C. 20590

24 February 1971 [SEAL]

Mr. Jerome B. Simandle
Center for Study of Responsive Law
1908 Que Street, N.W.
Washington, D.C. 20009

Dear Mr. Simandle:

This is in reply to your letter of 26 August 1970 applying for reconsideration, pursuant to Section 7.71 of Part 7 of the Department of Transportation Regulations (32 F.R. 9284), of an initial denial by the Deputy Associate Administrator for Operations of your request for you and your colleagues to "examine and/or copy the final SWAP Reports from the past year (1969) involving the 26 major air carriers." The Flight Standards Systemsworthiness Analysis Program (SWAP) represents a systems approach to the conduct of agency responsibilities for inspection and surveillance of commercial aviation operators.

Pursuant to paragraph 5, Appendix C of Part 7, have reviewed the requested documents. It is my determination that the requested SWAP Reports are exempt from public disclosure under the provisions of the Public Information Act (5 U.S.C. 552). The reports are exempt from public disclosure under 552(b)(3) of Title 5 of the United States Code. This paragraph provides for the exemption of matters that are specifically exempted from disclosure by statute and has been implemented by Section 7.57 of Part 7, as amended, of the Department of Transportation Regulations. Paragraph 8 of Section 7.57, as amended, exempts matters under "Section 1104 of the Federal Aviation Act of 1958 (49 U.S.C. 1504) relating to the withholding, upon requests, of information

obtained under that Act." The Administrator has determined that the SWAP Reports you have requested should be withheld from public disclosure.

It is my further determination that the requested SWAP Reports are intra-agency memoranda and should be withheld from public disclosure, consistent with the exemption contained in the Public Information Act, 5 U.S.C. 552 (b) (5), as implemented by Section 7.61 of Part 7 of the Department of Transportation Regulations. Section 7.61 provides in pertinent part:

> (a) Any record prepared by a Government officer or employee (including those prepared by a consultant or advisory board) for internal Government use is within the statutory exemption to the extent that it contains—
>
> (1) Opinions, advise, deliberations, or recommendations made in the course of developing official action by the Government; * * *
>
> (b) This section has two distinct purposes. One is to protect the full and frank exchange of ideas, views and opinions necessary for the efficient functioning of the Government. This judicially recognized privilege of protection against disclosure in litigation or elsewhere is intended to assure that these resources will be fully and readily available to those officials upon whom the responsibility rests to take official and final Department action. * * *

In addition, the requested reports are investigatory files compiled for law enforcement purposes by the Federal Aviation Administration and are exempt from public disclosure under the Public Information Act, 5 U.S.C. 552(b) (7).

Section 7.65 of Part 7 of the Department of Transportation Regulations, implementing § 552(b) (7) of the Public Information Act, reads in pertinent part:

> (a) Files compiled by the Department for law enforcement purposes, including the enforcement

of the regulations of the Department, are within the statutory exemption, except to the extent available by law to a private party.

(b) The purpose of this section is to protect from disclosure the law enforcement files of the Department, including files prepared in connection with related litigation and adjudicative proceedings. It includes the enforcement not only of criminal statutes but all kinds of laws. It is also the purpose of this section to preserve the position of the Government in litigation or potential litigation, in accordance with the rules governing discovery in cases before courts and administrative agencies. * * *

Examination of the SWAP Reports also indicates that much of the material contained therein is voluntarily submitted in confidence by the air carrier and accepted in confidence by the FAA. The effectiveness of the in-depth analysis that is the essence of a SWAP team investigation depends, to a great extent, upon the full, frank and open cooperation of the operator himself during the inspection period. His assurance by the FAA that the resulting recommendations are in the interest of safety and operational efficiency and will not be disclosed to the public are the major incentives impelling the operator to hide nothing and to grant free access to procedures, system of operations, facilities, personnel, as well as management and operational records in order to exhibit his normal course of operations to the SWAP inspectors. Based on the foregoing, it is also my determination that the requested SWAP Reports are exempt from public disclosure under the Public Information Act, 5 U.S.C. 552(b)(4), in that they contain trade secrets and commercial or financial information obtained from a person and are privileged or confidential.

Section 7.59 of Part 7 of the Department of Transportation Regulations, implementing § 552(b)(4) of the Public Information Act, reads in pertinent part:

(a) Trade secrets and privileged or confidential information that are within the statutory exemption include the following:

(1) Information furnished by any person, to the extent that the person furnishing the information would not customarily release it to the public.

(2) Information furnished and accepted in confidence.

* * * *

(b) The purpose of this section is to authorize the protection of records that are customarily privileged or are appropriately given to the Department in confidence. It assures the confidentiality of information obtained by the Department through questionnaires and required reports to the extent that the information would not customarily be made public by the person from whom it was obtained. In any case in which the Department has obligated itself not to disclose information it receives, this section authorizes the Department to honor that obligation.

* * * *

The above exemptions notwithstanding, it is Department policy, as expressed in Section 7.3 of Part 7 of the Regulations, that all records of the Department, except those that the Department specifically determines must not be disclosed in the National interest, for the protection of private rights, or for the efficient conduct of public business, are to be made available for public inspection and copying. It is my determination that disclosure of the requested SWAP Reports would be inconsistent with the purposes of Sections 7.57, 7.59, 7.61, and 7.65 exemptions, and would be contrary to the efficient conduct of the public business.

Accordingly, I am confirming the initial denial of your request to examine and/or copy the final SWAP Reports from the past year involving the 26 major air carriers. A copy of Part 7, as amended, of the Department of

Transportation Regulations is enclosed for your information.

Sincerely,

/s/ James R. Greenwood
JAMES R. GREENWOOD
Director of Public Affairs

EXHIBIT 4

Excerpts from SWAP Report
United Air Lines
February-March 1969

MAINTENANCE PERFORMANCE

FINDING No. 2

UAL's system for auditing aircraft maintenance records does not adequately detect discrepancies related to manual procedures for recording maintenance in their *aircraft flight log.*

Discussion

During the Team's review of the carrier's aircraft records, numerous cases were noted where the "Corrective Action" column of the flight logs did not contain correct entries, and deferred maintenance items were not properly recorded.

This is evidenced by examples found during logbook review which revealed: (1) Deferred items, when corrected on the flight log but no entry could be found on the flight logs where the item was originally deferred; (3) Flight discrepancies, entered in the flight log by the crew, not recorded, by maintenance, in the "Corrective Column", as having been corrected and (4) The continuous line required to be drawn across the flight log after corrective action taken by maintenance not being accomplished in all cases by the Line Maintenance Stations.

Examples:

1. B-737 aircraft N9135U had a cracked casting EAR in the right flap well deferred by DEN on 1/7/69 as item No. 27. No record of the casting replacement could be found on the flight log through 2/3/69. (Log No. 1841-17)

2. During an enroute inspection on B-727 aircraft N7627U on 3/18/69, it was noted on flight log 4343-8 that Detroit had rendered the APU inoperative because it was leaking and deferred the APU as item No. 174. The deferred Maintenance Form U0106D-2 in the back of the flight log revealed this item had been repaired at Newark and deferred item No. 174 cleared. The flight log did not reveal that deferred item No. 174 had been cleared by Newark maintenance.

3. On 12/2/68 the maintenance recorded on flight log page 958-13 (Book 61) of B-720 aircraft N7228U revealed that deferred item No. 164 was cleared by replacing the righthand fillet flap assembly. A review of prior flight logs failed to reveal where and when the flap was originally deferred.

* * * *

Finding No. 3

The Team's review of Progressive Maintenance Checks and the time control system for AUL B-727 commuter aircraft revealed the program to be operated satisfactory except for one (1) Service Check which had exceeded its approved check period.

Discussion

The Team's review of completed checks and time control records, at the Los Angeles station, revealed satisfactory records with the exception of one (1) Service Check (150 hours) which had exceeded its approved time limit by 55 minutes. No other time limits were found to have been exceeded on other checks, and the Team believes, and the records indicate this to be an isolated case.

The aircraft involved was B-727-22, N7620U:

A 3B check was accomplished 3/1/69 at an aircraft TSO (corrected) of 2021:33 hours and the 3C Check was accomplished 3/20/69 at an aircraft TSO (corrected) of 2172:28 hours.

The 3C Check was accomplished at 150:55 hours.

(Ref. 121.3)

Conclusion/Recommendation

The Team concludes that UAL is in non-compliance with FAR 121.3 in that they did operate an aircraft in excess of the times approved in their Operations Specifications.

No recommendation is believed necessary.

* * * *

Finding No. 4

United Airlines maintenance personnel do not always adhere to their Maintenance Manual Policies and Procedures when releasing aircraft for service as required by the Minimum Equipment List (MEL).

* * * *

Conclusion/Recommendation

The Team concludes that the above type discrepancies prevail because they are undetected by UAL's Quality Control, or Audit system. It is therefore recommended that UAL's Quality Assurance Group include in their audit practices the matter of adherence to manual procedures dealing with use of the Minimum Equipment List and deferral of aircraft maintenance.

* * * *

Finding No. 5

Tools and equipment used as test devices were found to be overdue for calibration, or devoid of records to show calibration schedule and accomplishment, in accordance with UAL manual instructions.

* * * *

Conclusion/Recommendation

The Team concludes that the line stations involved in the above deviations from UAL standard are in non-compliance with these UAL standards for maintenance of accuracy in test equipment. This matter *should also* become a part of UAL's audit system in order to detect the above type deficiencies while performing other audit functions.

* * * *

Finding No. 6

Rotable spare components (MR Program units), in stores as serviceable, are not, in some instances, so identified on the yellow I & R tag stubs, in accordance with UAL manual instructions. (All data on these yellow stubs missing.)

* * * *

Conclusion/Recommendation

The Team concludes that UAL aircraft components not identified as serviceable in accordance with the UAL Maintenance Manual of Procedures are not eligible for use on their aircraft.

The Team recommends that UAL review the actual status of all such unserviceable units and take the necessary action to return the subject units to serviceable condition and identify such condition by appropriate serviceable tags. This matter should also become a part of UAL's audit system inspections.

* * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1970-71

REUBEN B. ROBERTSON, III, ET AL., PLAINTIFFS,

v.

JOHN H. SHAFFER, ET AL., DEFENDANTS

FEDERAL DEFENDANTS' CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT AND OPPOSITION OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

The federal defendants by their attorney, the United States Attorney for the District of Columbia, respectfully move the Court to grant partial summary judgment in their favor on the ground that there is no genuine issue as to any material fact and defendants are entitled to judgment as a matter of law. These defendants seek judgment that Systemworthiness Analysis Program Reports (SWAP reports) are exempt from disclosure under the provisions of the Freedom of Information Act by virtue of the provisions of 5 U.S.C. 552 (b) (3), (4), (5), and (7) and that certain Mechanical Reliability Reports (MRRs) are exempt from disclosure by virtue of the provisions of 5 U.S.C. 552(b) (3) and (4).

There are filed herewith: two affidavits of John H. Shaffer, with accompanying attachments, one affidavit dealing with SWAP reports and one dealing with MRRs; three sets of correspondence, marked Government Exhibits A, B, C; a statement of material facts as to which there is no genuine issue; a memorandum of points and authorities; and a proposed order.

/s/
HAROLD H. TITUS, JR.
United States Attorney

/s/
JOSEPH M. HANNON
Assistant United States Attorney

/s/
NATHAN DODELL
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing Federal Defendants' Cross-Motion for Partial Summary Judgment, two affidavits of John H. Shaffer with accompanying attachments, Government Exhibits A, B, C, statement of material facts, supporting memorandum of points and authorities and proposed order have been made upon plaintiffs by mailing a copy thereof to their attorney, James R. Michael, Esq., 1237 - 22nd St., N.W., Washington, D. C. 20037, and upon co-defendant by mailing a copy thereof to its attorneys, George W. Wise, Esq., Timothy J. Bloomfield, Esq. and David S. Lytle, Esq., 815 Connecticut Avenue, Washington, D. C. 20006, on this 31st day of May, 1972.

/s/
NATHAN DODELL
Assistant United States Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 1970-71

REUBEN B. ROBERTSON, III, ET AL., PLAINTIFF

v.

JOHN H. SHAFFER, ET AL., DEFENDANT

AFFIDAVIT

John H. Shaffer, being duly sworn, deposes and says:

1. I am John H. Shaffer, Administrator of the Federal Aviation Administration, Department of Transportation.

2. As Administrator of the Federal Aviation Administration I am responsible for and charged with the responsibility for aviation safety. 49 U.S.C. 1655(c)(1).

3. I have read and am familiar with the pleadings concerning the captioned case.

4. In order to provide for safety of flight in civil aircraft, the FAA has established a program known as Systemworthiness Analysis Program (SWAP).

5. The Systemworthiness Analysis Program is a system approach to the conduct of agency responsibilities for inspection and surveillance of the aviation industry.

6. A SWAP investigative team works in close cooperation with airline management to find any area of maintenance, operations, management, or overall performance which needs improvement. The system depends upon the frank and full disclosure of the airline.

7. Information investigated and discussed in a SWAP inspection includes financial and operational matters which would not customarily be released to the public. Much of the material is of the nature which would not be disclosed to competitors.

8. SWAP inspections also serve as the basis for enforcement action against the airline for failure to comply with the Federal Aviation Regulations.

9. The Systemworthiness Analysis Program had its beginning on 1 July 1966 with the inspection of air carriers. On 1 October 1969, the program was expanded to cover the general aviation industry.

10. The Systemworthiness Analysis Program is administered pursuant to FAA Handbook, Systemworthiness Analysis Program 8000.3B (See attachment No. 1).

11. The SWAP report is an internal memorandum intended for intra-agency communication containing a mix of facts and opinions written by the supervisory inspector.

12. The SWAP program operates with the understanding between the airlines and the FAA that the information will not be disclosed to the public. (Paragraph 208 (d) FAA Handbook 8000.3B, attachment No. 1).

13. Section 1104 of the Federal Aviation Act of 1958 (49 U.S.C. 1504, 72 Stat. 797) provides that the Secretary of Transportation may, upon written request, withhold information from public disclosure if such disclosures would adversely affect the interest of such persons and is not required in the interest of the public.

14. The authority vested by § 1104 of the Federal Aviation Act has been transferred from the Secretary of Transportation to the Administrator of the Federal Aviation Administration pursuant to 49 CFR 1.47(a).

15. On 4 December 1970, FAA received a request from the Air Transport Association of America on behalf of 28 member airlines that all SWAP reports be kept confidential pursuant to § 1104 of the Federal Aviation Act of 1958. (See attachment No. 2)

16. On 18 February 1971, I determined that the disclosure of the SWAP reports would adversely affect the interest of the airlines involved and disclosure was not required in the interest of the public. (See attachment No. 3)

17. Plaintiffs' Memorandum of Points and Authorities, at page 2, states:

". . . SWAP Reports, which purport to identify and document specific defects in safety practices of air carriers, are provided to and discussed in detail with air carriers and are widely circulated among the members of defendant ATA. See attached affidavit of Plaintiff Robertson, p. 3."

Mr. Robertson's affidavit states, at page 3, para. 6:

". . . It is my information and belief that the results of SWAP evaluations, which purport to identify and document specific defects and shortcomings in the safety and maintenance systems of air carriers, are provided to and discussed in detail with the air carriers and are widely disseminated and discussed throughout the airline industry. . . ."

Under our procedures, FAA does not make information from SWAP Reports available to ATA or to any operator other than the operator being inspected. Information from the SWAP Report relating to findings of the SWAP team may be provided to the operator being inspected. See, e.g. Handbook, para. 208. The purpose is to enable the operator to intelligently discuss the SWAP findings with the principal inspector and SWAP team members at the post-inspection visit. Such discussion facilitates the taking of corrective action, where necessary.

Thus, insofar as the aforementioned quotations deal with FAA circulation and/or dissemination of SWAP report information, they are incorrect. The only other manner in which the dissemination and circulation alleged by plaintiffs could occur would be if each operator that is subject to a SWAP inspection disseminated any such information as may be provided it. On information and belief and on my knowledge of the airline industry, I do not believe the operators circulate or disseminate SWAP information as alleged by plaintiffs.

/s/ John H. Shaffer
JOHN H. SHAFFER

Subscribed and sworn before me this 30th day of May 1972.

/s/ William G. Derry
Notary Public in and for
the District of Columbia

My commission expires 14 Sept. 1975.

HANDBOOK

[8000.3B]

SYSTEMWORTHINESS ANALYSIS PROGRAM

[F.A.A. Seal]

JULY 23, 1969

Reprinted NOV 1970
Reprint includes Changes 1 thru 2

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

Distribution: 8000; FFS-1, 2, & 5 (all employees)
FIA-O (std.)

Initiated By: FS-320

FOREWORD

1. *PURPOSE.* This handbook authorizes the Systems-worthiness Analysis Program (SWAP) as a program of the Flight Standards Service and provides procedures and standards regarding its organization and operation.
2. *CANCELLATIONS.* Handbook 8000.3A, dated August 16, 1968, is canceled.
3. *BACKGROUND.* The Flight Standards Systems-worthiness Analysis Program (SWAP) is a systems approach to the conduct of agency responsibilities for the surveillance of commercial aviation operators. Recognizing that commercial aviation safety is only as good as the management system which produces it, SWAP provides the FAA with an audit-type analysis of these management systems.
4. *DEVELOPMENT AND UTILIZATION.* Order 8000.3, dated June 9, 1966, required full implementation of SWAP on a permanent assignment basis beginning October 1, 1967. Implementation of the air carrier program is now complete. A test program conducted in the Southern Region to determine applicability of SWAP methods to surveillance of general aviation commercial activities was completed October 1, 1968. Results of this test indicate that more effective and efficient use of manpower resources can be achieved through application of SWAP to certain segments of general aviation surveillance. Each Regional Director and the Assistant Administrator, European Region, shall expand and utilize the program in accordance with this revised handbook and consistent with the following schedule:

   a. *General Aviation Phase I.* By October 1, 1969, have personnel selected for temporary SWAP team assignment, develop schedule of inspections to be conducted, and begin inspections. Reference Chapter 7.

b. *General Aviation Phase II.* By January 1, 1970, make permanent assignments of personnel and effect relocation as necessary. Adjust inspection schedules and incorporate program refinements.

c. *General Aviation Phase III.* By July 1, 1970, effect full implementation.

5. *PROGRAM RESPONSIBILITY.* The Flight Standards Service is responsible for the overall program management of SWAP and shall provide procedures, standards, and other usual staff services.

6. *PUBLIC AVAILABILITY OF INFORMATION.* This handbook is in no way restricted and the employee to whom it is issued will make it available for review by the public upon request. Copies of this handbook may be obtained (for a nominal fee) by written request to the:

Manager of Headquarters Operations
Federal Aviation Administration
Department of Transportation
800 Independence Avenue, SW.
Washington, D.C. 20590

/s/ R. S. Sliff
Acting Director
Flight Standards Service

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CHAPTER 1. GENERAL INFORMATION AND OBJECTIVES

1. *DESCRIPTION.* The Flight Standards Systemsworthiness Analysis Program represents a systems approach to the conduct of agency responsibilities for inspection and surveillance. To make optimum use of the limited number of inspectors in the face of an increasingly active industry, this program provides for the use of inspection personnel with the greatest possible precision so that their efforts can be concentrated in those areas having the greatest potential effect on safety. The key features of the Systemsworthiness Analysis Program are:

   a. *Orienting maintenance and operations surveillance inspection practices* to a comprehensive systemsworthiness concept in order to permit inspections in depth in the major areas of operations and maintenance.
   b. *Utilizing teams of inspectors* to perform programmed and special inspections when indicated by safety trends, with a corresponding efficency in routine resident inspector surveillance.
   c. *Employing sophisticated analysis* of performance and reliability data to better point inspection efforts toward critical areas.
   d. *Defining the role of the resident inspector* regarding systemsworthiness analysis activities.

2. *OBJECTIVES.* The objectives of the Systemsworthiness Analysis Program are to:

   a. *Provide efficient* utilization of inspector personnel.
   b. *Provide fast* detection and correction of deficiencies in flight operations and maintenance systems.
   c. *Assure the quality* of FAA inspections of air carriers, commercial operators, air taxi operators, repair stations, airmen schools, and other appropriate industry segments.

d. *Emphasize responsibility* of resident inspectors as primary agency representative.

e. *Eliminate* to the maximum extent practicable inspections by resident inspectors assigned to the operator to permit these inspectors to maintain surveillance of the overall posture of the operator to determine any sensitive areas which may require examination by the SWAP team.

3. *HOW PROGRAM OBJECTIVES ARE ACCOMPLISHED AND BENEFITS.*

a. *Efficient Utilization of Inspector Personnel.*

(1) By concentrating on significant safety deficiencies, thus getting more out of our safety dollar.

(2) Minimizes frequency of inspections on operators performing satisfactorily.

(3) Permits flexibility in the deployment of inspectors.

(4) Avoids inspections by the numbers.

(5) Permits across-the-board use of inspectors.

b. *Fast Detection and Correction of Deficiencies.*

(1) By use of key indicators such as MRR, MIS, MIR and M&D data, and operators' reliability reports.

(2) By periodic systemsworthiness analysis in depth which provides an optimum method of disclosing deficiencies in operations and maintenance programs.

(3) FAA requested corrective actions are based on more comprehensive factual data.

(4) Allows principal inspector freedom to objectively monitor his assignment.

c. *Assure Quality FAA Inspections.*

(1) Systemsworthiness analysis team members, not assigned to any particular operator, are objective.

(2) The Systemsworthiness Analysis Program broadens technical competence of FAA in-

spectors by exposing them to a number of various management systems.

(3) By placing manpower on deficient areas, inspectors not tied to the numbers.

d. *Emphasize Responsibility of Principal Inspectors as Primary Agency Representative.*

(1) By supporting principal inspector with factual, documented findings of analysis team with which to justify and defend agency required corrective actions.

(2) By functioning as the key agency representative, he is clearly the focal point for FAA inspection and surveillance of his assigned operator on a systemwide basis.

4. *PRESENTATION.* The material contained in this handbook is presented in the following sequence:

a. *Chapters 2, 3, and 4* provide instructions applicable to the overall Flight Standards Systemsworthiness Analysis Program.

b. *Chapters 5 and 6.* The air carrier maintenance and operations areas of the program are discussed separately. Although these areas are complementary and constitute subprograms within the overall Systemsworthiness Analysis Program, their respective subject matters are sufficiently specialized to require separate treatment.

c. *Chapter 7* provides instructions for implementation of the General Aviation portion of the Systemsworthiness Analysis Program.

5.-49. *RESERVED.*

CHAPTER 2. ORGANIZATION

50. *MISSION AND FUNCTIONS.* SWAP teams are established as an element of the Flight Standards Division, on the regional level, to perform in-depth analysis of commercial aviation operators. When performing these analysis, the team serves as a

factfinding arm of the air carrier principal inspectors or general aviation district office (GADO) supervising inspector assigned to the operator. The product of the team effort is a report of findings and recommendations and is provided to the air carrier principal inspectors or GADO supervising inspectors who have responsibility for determining what corrective action is to be taken.

51. *STRUCTURE.* SWAP teams are organizationally subdivided into maintenance sections and operations sections each containing a number of permanently assigned team members who perform the analysis function primarily in their area of specialization. Team members are responsible to a section chief who in turn is responsible to the chief of the Systemsworthiness Analysis team. For General Aviation SWAP Team Organization see paragraph 503a.

52. *PHYSICAL LOCATION.* The regional director shall determine the location(s) of the SWAP team(s) based on location of major workload, facilities, travel per diem requirements, etc. The use of split teams is a prerogative of the regional director and is recommended where efficiency, expenses, team morale, etc., are significant factors.

53-99. *RESERVED.*

CHAPTER 3. ELEMENTS OF THE SYSTEM

100. *SCHEDULED SYSTEMSWORTHINESS ANALYSES.* Systemsworthiness analyses will be scheduled at such frequencies as to permit a complete analysis approximately every 18 months. The operations and maintenance analyses of air carriers should normally be scheduled separately, since each is concerned with different segments of management often located in different cities. See Chapters 5, 6, and 7 for identification of the areas to be individually analyzed during each scheduled 18-month cycle.

101. *SPECIAL SYSTEMSWORTHINESS ANALYSES.* Special systemsworthiness analyses will be conducted on an as-needed basis and may be required by Washington Headquarters, the regional office, the area office, or resident inspector whenever there are valid indications that the performance of a particular operator is falling below an acceptable level. The procedures employed are similar to those followed in a scheduled analysis, except that the analysis is concentrated on those areas of the operator's system that are suspected of being deficient. Some conditions that would warrant a request for a special analysis are:

a. Accidents and incidents.
b. Violations.
c. Poor financial condition. Some examples of indications of financial stress that can be detected by inspectors are:

(1) Demands for "cash on delivery" by suppliers who formerly allowed credit.
(2) Curtailment of flight operations.
(3) Significant layoff of personnel.
(4) Significant employee turnover.
(5) Delays in meeting payrolls.
(6) Sale or repossession of aircraft.
(7) Inadequate maintenance of aircraft.

d. Repetition of the same types of difficulties reported under the Mechanical Reliability Reports (MRR) system over an extended period of time.
e. Consistently high number of items on the Mechanical Interruption Summary Reports (MIS).
f. High percentage of uncompleted pilot-in-command flight checks.
g. High percentage of complaints concerning safety items.

102. *PERSONNEL.* Since the success of the Systemsworthiness Analysis Program depends in no small part on the quality of the personnel selected, par-

ticular attention should be given to the choice of the team members. In addition to the obvious experience and technical qualifications required, the following qualities are considered essential:

a. Demonstrated analytical ability.
b. Attention to detail and thoroughness.
c. Logical thought processes that relate causes and effects and formulate conclusions based on facts.
d. Tact and diplomacy in dealing with people.

Airman Certification Inspectors (ACI) with premium pay may be assigned as team members on a full-time basis and are not required to obtain 750 TR/ER hours annually. Such personnel are, however, expected to accomplish the ACI job functions necessary to the SWAP inspections and the regions' ACI work program. The assignment of ACI personnel to SWAP teams is not intended to establish new ACI positions in the regions.

103. *SYSTEMWIDE.* To the extent practicable, each region will conduct systemsworthiness analysis of assigned operators on a systemwide basis. For those situations where assistance will be required from other regions, the regions concerned should mutually agree to such arrangements in advance.

104. *ASSISTANCE FROM OTHER FAA PERSONNEL.* The Flight Standards Service has primary responsibility for the certification and operations of commercial aviation enterprises. In performing this function, Flight Standards' offices may request the assistance and advice of other FAA offices (services) in carrying out this responsibility. Every effort should be made to avoid excessive travel to inspect isolated, relatively minor facilities. These inspections can be easily performed by the region in whose area the facility lies. Obviously, common sense and judgment must be used, since there may be situations requiring deviations from this procedure.

105. *RECOMMENDATIONS FOR REGULATORY CHANGES.* The SWAP team is in an excellent position for determining amendments to the FARs. Team members are encouraged to submit proposed changes to the FARs by separate letter to the Regional Chief, Flight Standards Division for further forwarding to Washington headquarters.

106.-199 *RESERVED.*

CHAPTER 4. SYSTEMSWORTHINESS ANALYSIS PROCEDURES

200. *TEAM COMPLEMENT.* The size and makeup of the team required to perform a scheduled or special analysis will vary depending on the number of functional areas to be covered, the size and complexity of the operator, etc. Team assignments and scheduling are the responsibility of the Chief, Systemsworthiness Analysis.

201. *TEAM BRIEFING.* The team leader, or the inspector designated as being in charge of the particular analysis, will brief the team members prior to the start of the inspection. This briefing should include the inspection plan, the inspection techniques to be used, the specific areas to be assigned to each team member, team conduct and actions in working with the operator, and the estimated time to complete the inspection. This briefing should also include any special information available from other sources such as MRR data, financial information, and complaints. Team members will be cautioned not to discuss any of the team findings, conclusions, or opinions with anyone other than team members and appropriate agency personnel prior to the post-inspection briefing of the operator.

202. *AIR CARRIER PRINCIPAL OR GADO SUPERVISING INSPECTOR'S BRIEFING.* The Systemsworthiness Analysis team will be thoroughly briefed (operations or maintenance/avionics as appropriate)

prior to the start of the inspection. This briefing should cover the following subjects:

a. The operator's compliance disposition and working relationship with FAA.
b. The operator's organization and a resume of its key personnel.
c. A summary of the factors pertinent to the area to be analyzed including both good or marginal features.
d. Any other information which will assist the audit team.

203. *OTHER BRIEFINGS.* The inspection team will have free access to manuals, correspondence, and records pertaining to the operator, and any other appropriate data maintained by district offices. All material and data pertinent to the inspection will be studied by the team to acquaint them with the operator's policies, instructions, and procedures. It is essential that the team has a good working knowledge of the operator's management policies and procedures applicable to the area to be investigated before they meet with the operator. In this manner, the team will be better equipped to discuss intelligently the policies and methods used by the operator in the direction and control of its operation.

204. INITIAL MEETINGS WITH THE OPERATORS.

a. *The air carrier principal or GADO supervising inspector will arrange* for and chair the initial meeting of the inspection team and the operator. He will explain the purpose and scope of the inspection and identify the areas to be investigated. In cases where a problem area is suspected to exist, it should be frankly discussed with the operator. This straight-forward approach will help to foster a feeling of mutual trust and respect that is beneficial, if not essential, to the analysis. At this time, the operator will be advised that he will be informed of the team's findings at a meeting to be called by

the district office when the inspection has been completed.

b. *The operator should also* be advised that experience has shown that rumors relating to FAA findings while the inspection is in progress are not unusual and should be disregarded. Such rumors usually stem from the searching nature of the questions posed by members of the team. Team members will normally not discuss findings with the operator's personnel until the team is ready to formally brief the operator. If a serious safety problem is disclosed during the inspection, the operator will be informed so that prompt corrective action can be taken.

205. THE SYSTEMSWORTHINESS ANALYSIS FUNCTION.

a. *As an essential preliminary*, each team member will familiarize himself with the operator's policies, procedures, records system, and directives which govern the particular area to be analyzed. During the review and analysis, the team member should make notes and references to serve as memory-joggers during the inspection. This will minimize the need for subsequent research of manuals, records, and files to ascertain a specific policy or directive.

b. *A successful systemsworthiness analysis* requires careful factfinding and objective analysis. When a deficiency or questionable area is detected, a thorough search must be made to trace it back through the system to the causal point of origin. The inspector must concentrate on the area under analysis and pursue it to a positive completion so that a factual determination can be made.

This may occasionally involve consideration of other areas that were not originally intended for inspection. When this occurs, the new area should be investigated until factual conclusions

can be drawn. It is important, however, that the inspector return to the area under consideration before he was sidetracked, since any loss of continuity could result in erroneous or incomplete findings.

c. *Deficiencies existing* in any organization may result from a variety of causes. The team should be particularly alert to indications of inadequate communications or followup procedures and lack of effective delegations of authority. Identifying the deficiency and isolating the factors contributing or causing it may be expedited by applying the following procedures:

(1) Relate the cause of the deficiency to one of the following:

(a) *Lack of Supervision.* Check for the adequacy and understandability of instructions and directives, the training and competency of personnel. In this respect, do employees understand and effectively carry out company policies and procedures? Determine whether proper delegations of authority are made down through the chain of command. It is one thing to delegate authority and another to see that delegated responsibilities are carried out effectively in accordance with established policies and procedures. Therefore, the team must evaluate the adequacy of control exercised by management by determining how management follows up in order to ascertain policy and procedural compliance. Also, remember even if company policy is carried out through the chain of command, the basic policy or procedure could be wrong.

(b) *Inadequate Procedures.* Determine whether or not procedures are set

forth clearly and are practicable of accomplishment. When analysis of a problem area discloses that existing instructions are inadequate or the system used in implementing instructions lacks proper definition, detail, or sensibility, then procedures should be the prime area of concern. For example, past inspections have revealed extremely cumbersome or impractical airman records systems. In those cases, inspectors have frequently disclosed violations of flight time limitations or failure to schedule crewmembers for required recurrent training. Past inspections have also disclosed areas where procedures were needed, but none were provided.

(c) *Inadequate Policies.* It is important that the team determine whether the operator's policy is set forth in a manner which will assure compliance with acceptable safety standards. Assuming that company policy as set forth in the operator's manuals and directives is satisfactory, determine whether company policy is in fact being carried out in actual practice. Some past inspections have revealed operators having excellent training programs laid down in their manuals, who, in fact, had no training program at all and which existed only on paper. It is, therefore, imperative that the operator have established adequate procedures to monitor compliance with company policy.

(d) *Fraudulent Records.* When the team suspects that the operator is falsifying his records, assistance by regional Compliance and Security, Audit, and Legal

personnel will probably be necessary. Frequently, a simple crosschecking of company records will reveal discrepancies, such as checking aircraft logbooks against training records. Another technique successfully used in the past has been to check flight plan information available in ATS facilities against company records.

(2) *The art of asking the right question* at the right time of the right person is one of the key attributes of a successful systems-worthiness analysis. This art should be employed continuously by team members during an inspection, since it serves to expose abstract areas, confirms or disproves adherence to the established systems, and provides an insight into the acceptance and applicability of established policies and procedures.

Team members should not confine their inquiries to any particular group of personnel or organizational level. It may be anticipated that supervisory personnel will be well-versed in the policies and procedures governing the work functions for which they are responsible. However, they may be unaware of trouble spots existing at lower echelons or short cuts taken at the working level that may adversely affect compliance with the regulations and accepted standards of safety.

206. PRELIMINARY REPORT. Immediately following completion of the inspection, a preliminary report will be prepared by the team. This report, which must be a clear, concise, factual record of the team's findings, provides the basis for briefing the air carrier principal or GADO supervising inspector in preparation for the post-inspection meeting with the operator.

207. POST-INSPECTION MEETING WITH THE OPERATOR.

a. *The air carrier principal or GADO supervising inspector* will arrange for and serve as agency spokesman in the team's meeting with the operator.

b. *The purpose of the meeting* is to informally advise the operator of the team findings and to permit free discussion of same with the operator. Any discrepancies discussed at the meeting must be fully supported by facts acquired by the team. However, the operator should be given ample opportunity to present additional facts which he feels mitigates discrepancies found by the inspection team.

208. REPORT OF SYSTEMSWORTHINESS ANALYSIS (RIS: FS 8000-3).

a. *The SWAP team report* is the vehicle that transmits the findings and recommendations developed during the inspection. It must be so written that the reader understands it, is satisfied that all information has been included, and feels confident that conclusions are supported by facts.

b. *Wide latitude regarding format* is afforded the team in preparing the final report. Basically, however, the report should contain: Findings (statements of fact); Discussion (description of the team's observations and documentation supporting the findings); and Conclusion (statement of the causes of the deficiency, their effect on safety or compliance with the regulations, and the team recommendation).

c. *Distribution of the reports* within the region shall be determined by the regional director. Copies of individual air carrier SWAP reports should not be forwarded to Washington headquarters. In lieu thereof, a report of the significant findings of the SWAP team, i.e., viola-

tions, deteriorating maintenance, weaknesses in pilot training programs, etc., shall be furnished to the Chief, Maintenance Division, FS-300, and Chief, Operations Division, FS-400, as appropriate. The reports of significant findings should include the followup action taken or planned by the FAA or operator. During implementation phases, FS-300 and FS-400 will be provided with copies of general aviation SWAP reports.

d. *Nondisclosure to the Public.* The contents of SWAP reports constitute findings and recommendations employed by the FAA in the enforcement of Federal Aviation Regulations. Accordingly, under the exemption authorized by Section 7.65 of Part 7 of the DOT regulations, copies of SWAP reports or information therein shall not be publicly released or handled indiscriminately. Individual inspection team reports shall be considered as being "For Official Use Only" under the provisions of Order 1600-.15C, Information "For Official Use Only" and shall be marked in accordance with paragraph 7 of the Order. This classification is for the completed SWAP report and does not prohibit transmitting to the operator a listing of valid findings prior to the post inspection meeting when the principal inspector and SWAP team leader agree that such action will be beneficial.

209. OFFICIAL NOTIFICATION OF OPERATORS.

The air carrier principal or GADO supervising inspector will carefully review the final report, paying particular attention to the discussion and recommendations pertaining to each finding. After his review, he will prepare a letter to the operator advising of deficient areas and also reaffirm verbal agreements with the operator and confirm actions that may have been taken during the SWAP inspection. The letter will request the operator to take corrective action and, as appropri-

ate, establish deadlines for accomplishment. The district office will follow through to assure that necessary corrective action is taken by the operator.

210. *ROLE OF THE AIR CARRIER PRINCIPAL OR GADO SUPERVISING INSPECTOR.*

a. *It is essential* to the concept of the Systemsworthiness Analysis Program that the role of these inspectors be fully understood. The air carrier principal inspector serves as the principal FAA focal point in dealing with the operator on matters within his technical responsibilities (operations, maintenance, and avonics). The GADO supervising inspector or his assigned representative is the FAA focal point in all dealings with the operator. They are the eyes and ears of the regional director with respect to the detection of marginal areas of compliance. Accordingly, they are responsible for the broad surveillance of the operation as to whether it meets the terms of the regulatory requirements. Further, they are the key individuals who assure and enforce, if necessary, compliance with the FARs. In pursuit of these duties, these inspectors are the persons upon whom the region depends to provide timely notification when special systemsworthiness analysis inspections are needed in order to probe suspected areas of marginal or substandard compliance.

b. *Since these inspectors are the persons most familiar* with the operation, they will be of considerable assistance to the Systemsworthiness Analysis team during scheduled as well as special analyses. They should not take an active role as a participant of the analysis team, but can help the team members by pinpointing possible areas for analysis. During the analysis process, they remain the principal FAA spokesmen with regard to items which require immediate attention as well as after the analysis with regard to the initiation and followup of

corrective action programs. In this respect, they will be backed by the factual documented findings of the team.

c. *The overall goal of the Systemsworthiness Analysis Program* is to provide for a properly applied directed surveillance effort. One part of the goal is to permit the assigned inspectors to be placed at the pulse of the operator, free them from the more routine duties, and facilitate access to the operator's entire system of operation. Accordingly, the air carrier principal inspector and GADO supervising inspector are not expected to conduct inspections routinely in; for example, areas such as facilities or airmen records when these areas have been recently reported to be satisfactory by the SWAP team. However, in the event the SWAP team points out sensitive areas which require additional surveillance, the certificate-holding office is to accomplish the necessary surveillance until the condition reported by the SWAP is resolved.

211. *PROGRAM ACCOUNTABILITY.* Units and manhours spent conducting air carrier and general aviation maintenance/avonics systemsworthiness analysis will be reported on FAA Form 1380-21, Maintenance and Avonics Systemsworthiness Analysis Work Program and Activity Report (RIS: FS 1380-10). FAA Form 1380-22, Air Carrier Operations Systemsworthiness Analysis Work Program and Activity Report, (RIS: FS 1380-11), will be used by air carrier operations teams, and line item 50A on FAA Form 1380.17, General Aviation Operations Work Program and Activity Report (RIS: FS 1380-4) will be used by the general aviation operations teams. Instructions for executing these forms are contained in Handbooks 1380.1A and 1380.2A, Standard Procedure for Uniform Reporting.

212. *HANDLING OF TEAM FINDINGS.*

a. *General.* One of the objectives of the Systems-worthiness Analysis Program is to emphasize the responsibility of assigned inspectors as the primary agency representatives for their operators. In order to effectively carry out this responsibility, these inspectors must heavily rely on the findings of the SWAP teams. Accordingly, it is imperative that the team findings be FACTUAL. In cases where noncompliance is found by the SWAP team, it is expected that the team findings will include sufficient evidence to support the alleged noncompliance. There may be occasional instances where such evidence is not immediately or readily available. In such cases, the team should secure all possible supporting information concurrent with their inspection duties. This information should be turned over to the assigned inspector for handling.

b. *Processing of Noncompliance.* The SWAP teams have no responsibility for the processing of these reports. Noncompliance reported by SWAP teams will be handled by the district office in accordance with Handbook 8030.7, Compliance and Enforcement.

213. *FEEDBACK REGARDING CORRECTIVE ACTION.*

a. *An important element of the SWAP concept is feedback* to those organizational elements responsible for overall program management. Feedback provides an orderly means of determining needs, analyzing operations, and making comparisons along program lines. It enables the various levels of management to know how things are going, to identify problems, to recognize the need for program change, and to permit adjustment of program emphasis or changes in policy or procedures.

b. *This feedback should* be provided by a followup report transmitted through the appropriate office to the region within a reasonable time (normally within 60 days) following the receipt of a SWAP report. The followup report should contain the following minimum information:

(1) Where corrective action has been taken.
(2) Where corrective action is not forthcoming.
(3) Action underway or planned on open items. A carryover item will be resolved and reported as soon as possible.

214.-299. *RESERVED.*

CHAPTER 5. SYSTEMSWORTHINESS ANALYSIS PROGRAM (AIR CARRIER MAINTENANCE)

SECTION 1. GENERAL INFORMATION

300. *PURPOSE.* This section provides guidance and procedural instructions applicable to the maintenance subsystem within the overall Flight Standards Systemsworthiness Analysis Program.

301. *OBJECTIVES.* The Systemsworthiness Analysis Program applies an auditing technique to assure:

a. An accurate and penetrating assessment of all elements of the operator's maintenance systems.
b. Improved effectiveness of all surveillance functions through analysis of the vital elements of a maintenance system.
c. Increased effectiveness of the principal inspector concept.
d. The acquisition of factual data relating to the status of the operator's compliance with applicable Federal Aviation Regulations.
e. A factual determination of the potential of a maintenance program to consistently turn out aircraft and components that are safe for use in flight.

302. *OPERATOR'S ORGANIZATION.* The systems used by operators to maintain aircraft may be divided into four primary areas. The successful and economical operation of these complex maintenance areas is dependent upon the thoroughness and effectiveness of directives and followup systems generated by the operator's management group. These directives and followup systems normally consist of the policies, procedures, and methods applicable to one or more of the listed functions.

AREAS	FUNCTIONS
1. Standards and Procedures	a. Training
2. Quality Assurance	b. Quality Control
3. Equipment and Facilities	c. Inspection
4. Personnel and Training	d. Production Control
	e. Product Improvement/Modification
	f. Maintenance Performance
	g. Performance Analysis

NOTE: Until a new form is developed (effective 1 July 1970), continue to report SWAP activities on FAA Form 1380-21 in the same manner using the same functional areas.

303. *SCHEDULED ANALYSIS.*

a. *In general,* a scheduled systemsworthiness analysis should be limited to one area of an operator's maintenance system. This should assure that the time lapse between analysis is not sufficiently long to permit a significant deterioration in the operator's maintenance system. However, several functions of any area may be analyzed at the same time by an optimum team without seriously disrupting the operator's maintenance system or unduly interfering with its personnel.

b. *A SWAP team analysis* of an air carrier or commercial operator should not require a rou-

tine SWAP team visit to the certificated facilities with which the carrier contracts unless that facility functions as the physical location of the carrier's main maintenance base. During the analysis of an air carrier's or commercial operator, a nonroutine visit to a certificated contract facility may occasionally be required to establish or verify that work is being performed in accordance with the carrier's maintenance program. Such visits should be coordinated with the facility's certificate holding office and should be limited to the specific problem at hand and not to determine the repair facility's compliance with its own manual or the regulations.

304. *SPECIAL ANALYSES.* Examples of maintenance items that would warrant requesting a special analysis include:

a. Repetition of the same types of difficulties reported under the MRR system over an extended period of time.

b. A consistently high number of items on the Mechanical Interruption Summary Reports.

305.-329. *RESERVED.*

SECTION 2. ANALYSIS PROCESS

330. *BRIEFING.* In addition to the general items cited in paragraph 202, the principal inspector's preanalysis briefing should also cover the following:

a. *Problem areas* existing within the operator's organization relating to equipment, general operation, maintenance programs, and maintenance contractors.

b. *Location of bases* where major maintenance is performed, types of maintenance being accomplished, and the frequency of such work.

331. *PREPARATION.*

a. *Reviewing the air carrier's MIS and MRR files* will help the analysis team member to identify problem areas in the carrier's maintenance system. Repetitive occurrences associated with an aircraft, its powerplants, or components (e.g., incompleted trips, frequent delays attributable to maintenance, etc.) are indicators warranting exploration during the actual analysis.

b. *Among other things,* the operator's management system should provide procedures for:

(1) The proper channeling of each piece of aircraft hardware through essential inspection and maintenance shops.

(2) The proper maintenance and inspection of parts routed to the individual shop.

(3) Ascertaining that each part repaired and/or inspected by the individual shop is not released to service unless it is in a safe condition for flight.

(4) Recording items of work performed in each shop area through which the part was routed.

(5) Indicating the part is in safe condition for flight prior to being returned to service.

332. *ANALYSIS AT WORK.* An illustration depicting the analysis processes including the technique for a penetrating analysis is shown on figure 1. Study this diagram; it illustrates the type of follow-through (ascertaining cause and determining effect) included in the analysis processes.

a. The left-hand side of the illustration is another method of presenting the operator's seven management groups responsible for establishing maintenance directives, policies, and procedures. In applying the Systemsworthiness Analysis Program, the analysis team evaluates and famaliarizes themselves with those management segments to be analyzed.

b. The first level to which the management's policies are applied is the submanagement and supervisory categories at the overhaul base, check base stations, and line stations.

c. The analysis team verifies the application, acceptance, and comprehension of top management policies at this level. When only partial comprehension, acceptance, or application is found, the CAUSE for deviations will be determined.

d. In making a determination as to cause and effects of deviations from significant policy, certain lead words can be used advantageously (who, what, when, where, why, and how). The type of modifiers to be used with these lead words will de dependent upon the information being sought; e.g., HOW was it authorized (in writing or verbal), WHO authorized the chance, etc. It is apparent that the use of such words does not lend the question being asked to a yes or a no answer. They tend to draw out the person receiving the reply and open up avenues for further questions. These fundamental lead words are highly effective analysis tools when used in a reasonable manner by a good listener.

e. The verification process of the Systemsworthiness Analysis Program is also used at the mechanic level. The techniques employed at this level are the same as those used for the submanagement and supervisory levels.

f. It is apparent that should the penetration phase of SWAP be applied to all deviations regardless of their significance, the analysis process would be cumbersome and time consuming. Therefore, before the penetrating processes are used on a deviation, their probable impact on compliance with FARs and the effectiveness of the overall maintenance system should be analyzed by the team. Should these analyses show the deviation would adversely affect the integrity of the maintenance system, etc., the penetration processes should be employed. If, on the other

hand, the analysis indicates the deviation is significant to the overall maintenance program, it should be noted by the audit team for discussion and disposition by the principal maintenance inspector.

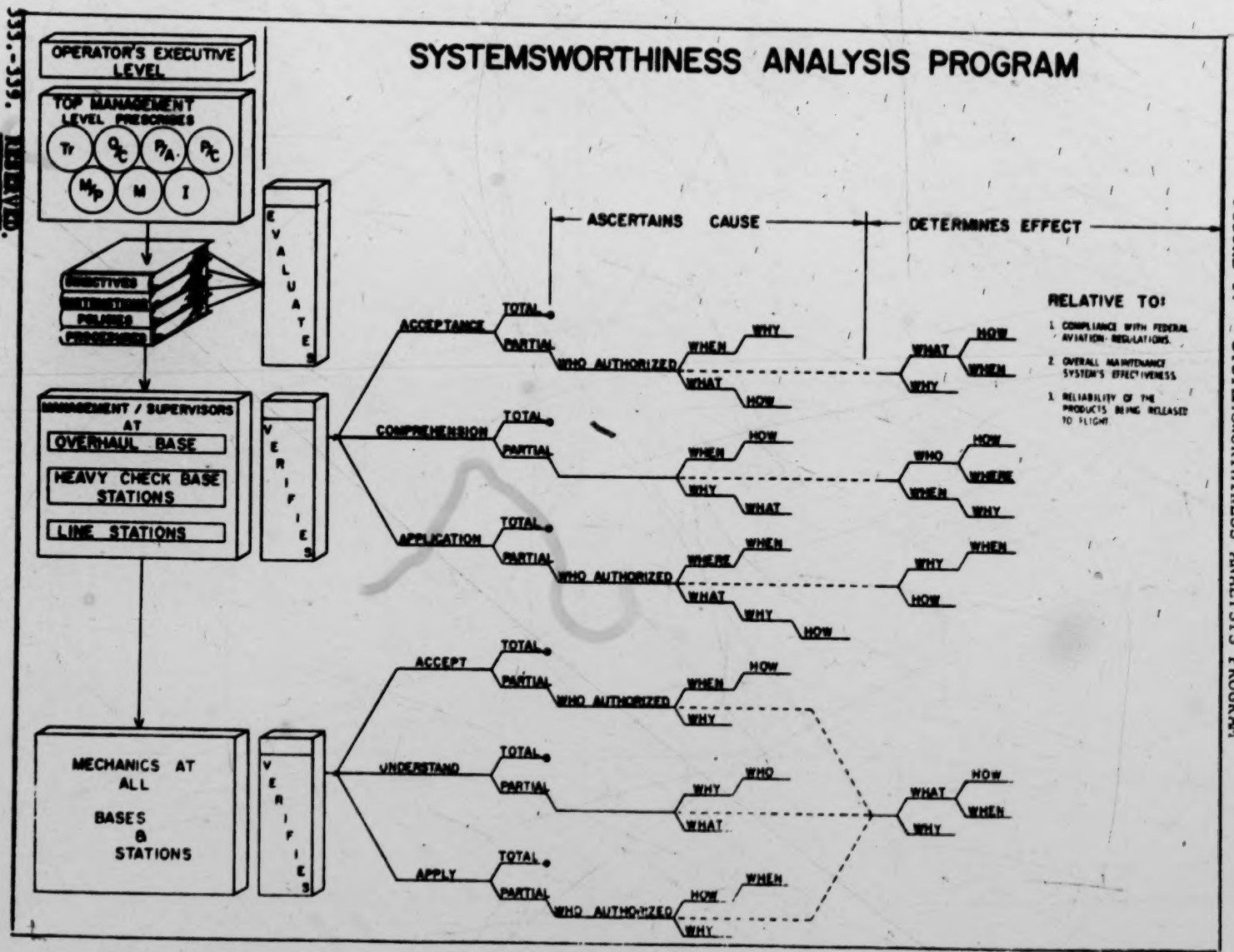


FIGURE 1. - SYSTEMSWORTHINESS ANALYSIS PROGRAM

SECTION 3. AIDS TO ANALYSIS

340. *PRIMARY ORGANIZATIONAL AREAS.* The following paragraphs provide information on the four primary areas used by operators to maintain their aircraft.

341. *STANDARDS AND PROCEDURES.* This basic area includes the operator's system for establishing what he is going to do and how he is going to do it. Where manuals are required by regulation, this is the area which includes responsibility for their publication, accuracy, adequacy, distribution, and revision status. This area also includes the operator's system for establishing and disseminating policy and guidelines for management decisions affecting flight safety and airworthiness. Since this area constitutes management's communication network, close attention should be given to the structure, responsibilities, staffing, and facilities.

In analyzing this area, it is important to bear in mind that individual discrepancies are usually indicators of system breakdown. When manuals are found with obsolete pages, SWAP should be concerned with the lack of management control which allowed this condition to exist. SWAP should be alert to situations where responsibilities and authority in regard to airworthiness determinations, etc., are not clearly delineated. Where procedures for work performance, inspection, testing, etc., are inadequate or erroneous, SWAP should be concerned with the qualifications, staffing, supervision, and control of the people and system which produce the procedures.

342. *QUALITY ASSURANCE.* This basic area includes all functions and activities directed toward assuring that work performed and services rendered are done so in accordance with the operator's policies, procedures, instructions, and in accordance with the applicable Federal regulations. This includes the system by which the operator assures that its prod-

uct conforms to an established standard. "Product" here is used in its broad sense. "Product" may mean an overhauled component, an installed modification, a trained airman, a repaired aircraft, etc.

A specific organizational segment may be responsible for this function. These units may be called an inspection department, quality control department, technical compliance, etc. Regardless of the product and of how formally structured this function is, the basic essentials are the same.

343. *EQUIPMENT AND FACILITIES.* This analysis area includes those organizational elements responsible for providing tools, classrooms, materials, shops, supplies, parts, and any other article or commodity, except people, used in the operator's "production" process. This function is also responsible for maintaining the condition and adequacy of these "production tools." Where the previous two areas have been concerned with "what is done" and "how well it is done," this area assures the wherewithal to actually do the job.

344. *PERSONNEL AND TRAINING.* This very important analysis area encompasses the total human element. It is concerned with both the quantity and quality of people. It includes availability, qualifications, competency, certificate requirements, direction, and training of the operator's personnel. Basically, the concern here is "are there enough competent people to do the job?"

In many cases, the Federal Aviation Regulations are specific in the requirements for certificated people, training programs, supervision, inspection authorization, etc. In other cases, personnel requirements are implied by requirements for "inspection systems," etc.

345. *FUNCTIONAL ANALYSIS AIDS.* The information in the following paragraphs describes the seven functions which may be used to assist in the analysis of the four primary areas either individually or in combination. The manner in which these seven

functions are used to analyze a particular area is at the discretion of the SWAP team leader.*

346. *PRODUCT MODIFICATION.* Product Modification is the function responsible for making alterations to a product so that it will more adequately satisfy its designed purpose. It is an integral part of the operator's total maintenance program, and is especially important in cases where deterioration of product reliability may affect the airworthiness of the aircraft.

a. *Product modification functions* are generally organized into an engineering department or a combination quality control and engineering department. Regardless of how the functions are organized, the department must be capable of properly controlling product modification. It must have competent personnel who are assigned the duties, responsibilities, and authority to make design changes and prepare necessary data and drawings including procedures and instructions necessary to accomplish the modification. Determination of the need for product modification usually originates in another area of the maintenance organization.

b. *Typical activities* which occur after the need for product modification is determined are:

(1) Evaluation and planning.
(2) Preparation of necessary data, drawings, and engineering change orders.
(3) Coordination with the product manufacturer as necessary.
(4) Parts, tools, and material specification.
(5) Preparation of procedures and instructions relative to accomplishing the modification.
(6) Followup after the product is returned to service.

c. *Many segments of the maintenance organization* must be closely coordinated in order to properly accomplish product modification. For example:

(1) A service bulletin is issued by the produc manufacturer concerning a service difficulty
(2) The analysis department furnishes the prod uct modification function (engineering de partment) with appropriate data concernin service experience with the product.
(3) The service bulletin is evaluated and the de cision is made to incorporate it into the air craft fleet.
(4) The engineering department prepares nec essary data including procedures and in structions.
(5) Purchasing and parts procurement depart ment obtains the necessary parts, materials and tools.
(6) The analysis department provides surveil- lance of the fleet and furnishes the product modification function with any other perti- nent data.
(7) The training department may become in- volved if the work techniques are special- ized.
(8) The production control department revises the maintenance schedules to provide suffi- cient time and manpower to accomplish the work.
(9) The maintenance department accomplishes the work and the inspection department performs a conformity inspection.
(10) The analysis department monitors the re- liability of the product and confirms correc- tion of the service difficulty.

This combined action completes the cycle and should provide an improved product.

d. *The analysis of this phase of the carrier's total maintenance program* considers the adequacy of the product modification organization, its auth- ority and control, and the existence of guidelines and procedures for its proper functioning. Also considered are such factors as the competency

of its personnel and their comprehension of and adherence to the carrier's policies, standards, and procedures. The following type questions will serve as probes for analyzing the modification area:

(1) How is the need for modification changes determined?
(2) To what extent is the manufacturer's engineering service used?
(3) What manufacturer's drawings, test reports, and system analyses are readily available?
(4) What system of feedback is used to advise the engineering group of any problems encountered with the implementation of the modification by the maintenance sections?
(5) Is there a check for airworthiness of all modifications by a qualified person other than the designer? If so, who makes the check and what are his qualifications?
(6) How is the determination made as to which modifications require FAA approval? Who determines what changes require FAA approval? How are the changes requiring FAA approval handled?
(7) How are weight changes recorded?
(8) How are Engineering Orders given to shops for action? Are they easily identified as EOs? Are they so written as to be easily understood by maintenance personnel?
(9) What actions must be taken before releasing a modification for work by the maintenance department?

347. *TRAINING.* The training function is an important and distinct part of the operator's organization. It provides for the systematic development of personnel knowledge, ability, and competence in maintaining the airworthiness of aircraft. Product quality can rapidly deteriorate to an unacceptable level through lack of proper training. The development of new and complex equipment and the rapid

changes in methods of maintaining aircraft require that personnel knowledge and skills must advance commensurately. In many cases, the introduction of new equipment into service has resulted in the selection of the most experienced personnel to maintain the new aircraft. This causes the older aircraft to be maintained by less experienced personnel and can result in a deterioration of product quality. In addition, many of the older aircraft are being operated by new operators, and as a result their personnel are unfamiliar with the aircraft and its system. In each of the above cases, training of personnel is necessary.

a. *The scope of training* is dependent upon the operator's program requirements. In all cases, individuals who have the duties, responsibilities, and authority for personnel training must be properly qualified and guided by adequate procedures and instructions. Training facilities and aids must be sufficient to meet the needs of the training program. Various types of training are utilized in the development of personnel competency such as:

   (1) Formal training on new equipment.
   (2) Recurrent training.
   (3) Indoctrination of new personnel.
   (4) Specialized and product manufacturer training.
   (5) On-the-job and self-instructions.

b. *Written procedures and instructions* that are clear and understandable are an effective supplement to any of the above training methods. They can serve a definite purpose by providing the step-by-step details of properly completing the work function.

   Training programs should contain standards for instructions, schedules, course curriculum, and provisions for recordkeeping. Although all of the following points in question form do not have universal application, it is suggested that

the applicable ones be considered during the analysis of an air carrier training function:

(1) Does the air carrier have an apprentice training program? How does it work? Where is it given? How comprehensive is it? Who administers it? What methods does the operator use to determine its adequacy?

(2) Does the performance of a particular job require initial formal training? Informal training from one employee to another? Training from supervisor to employee? What training is given? How is it administered? Who gives the required training? How is its adequacy determined?

(3) Does the carrier have a formal training department? What areas does it cover? Mechanics? Inspectors? Supervisors? Management? Engineers? Where in the organization does the Training Department fit? To whom do they answer?

(4) Who schedules employees for training? Is the Training Department involved in the scheduling of employees?

(5) Who develops the training outlines?

(6) Who decides the need for recurrent training?

(7) Is training extended to contractors' employees? How does the carrier determine the need for contractors' employees training?

(8) Are there adequate training aids for technical training?

(9) Are instructors competent and able for training assigned? Who makes the competency determination? How is it made?

(10) Are there indications of lack of training? Did personnel complain on lack of training? What specific deficiencies were cited? How did you verify or disprove the allegations?

(11) Are training records maintained on each employee? Where are they kept?

348. *PRODUCTION CONTROL.*

a. Production control is a management function responsible for scheduling maintenance operations including the necessary controls to assure that work is scheduled in accordance with time limitations contained in the operations specifications and the operator's manual. It is utilized to assure that maintenance functions are scheduled in logical sequence at the proper time and at a place where competent personnel, proper parts, equipment, tools, and instructions are available to accomplish the work required by the maintenance program. Production control serves as a regulator for the maintenance cycle. It provides safeguards to prevent:

(1) Exceeding approved time limitations.
(2) Backlog accumulation of work resulting in loss of scheduled aircraft service.
(3) Errors in workmanship through unplanned and hastily performed work.
(4) Shortages in available manpower.
(5) Failures to perform the work required by the Federal Aviation Regulations.

b. Many maintenance functions are performed on a nonroutine basis. In this respect, the system for production control must be sufficiently flexible to compensate for variations in workloads and provide the necessary schedule and control to assure that the work is accomplished. Production control is also the means of coordinating the efforts of the engineering, supply, maintenance, and inspection organizations. In accomplishing its functions, production control should know:

(1) The location of the aircraft on the route and scheduled flight time.
(2) Accumulated flight time each day.
(3) Total time and time since last overhaul on time controlled parts.

(4) Types of maintenance operations to be performed and the time interval for performing each operation.
(5) Man-hours necessary to perform the operation.
(6) Manpower availability at a given time and place.
(7) Parts requiring replacement in each maintenance operation.
(8) Availability of parts, tools, and equipment.
(9) Availability of spare equipment.
(10) Output capability of all shops in the repair facilities.

c. The following questions are developed to assist in making an analysis of the production control functions:

(1) Is there a separate organizational unit responsible for the scheduling of aircraft maintenance functions? Does it include the shop scheduling of parts, components, etc.? Are all shops considered in this scheduling?
(2) To whom does the scheduling organization answer?
(3) Are there any indications of the lack of necessary ground time to accomplish required maintenance?
(4) Are there an abnormal number of carryover items due to lack of time or parts?
(5) Who schedules ADs and engineering changes?

349. *QUALITY CONTROL.*

a. Quality control is the function by which air carrier management assures that its product conforms to an established standard. While there is generally a specific organizational segment responsible for this function, the elements of quality control are inherent in every functional area of the overall maintenance organization. The quality control organization should be

responsible not only for conformity to technical standards but also for conformity to company policies and procedures. In some organizations, the actual measurements of the product quality are performed by an inspection department and the standards or the requirement to inspect are established by the quality control organization. The extent to which the quality control organization assures conformity to company policies and procedures may differ widely among various carriers; therefore, analysis of this area must be carefully and thoroughly conducted.

b. The following questions are designed to assist the analysis team:

(1) Are the instruction and standards for doing a particular job sufficiently detailed to provide the worker with the data he needs? Are they understandable and clear? Do you understand them or do they generate a feeling of need for simplification, clarification, etc.?

(2) Are instructions (manuals) readily available to employees in need of them? Are manufacturer's manuals used? Who maintains them?

(3) Are individual job cards used? Do they contain the job instructions? Are they complete and accurate?

(4) How are job cards accounted for? Is there an established system? Is it satisfactory? Who controls this accounting?

(5) How are nonroutine items handled?

(6) Is adequate housing provided to permit continuous maintenance in inclement weather? If the housing is procured by contractual or other arrangements, is it satisfactory for the type of work to be done? Is it usable? Is it in the right location?

(7) Are sufficient workstands available to examine portions of aircraft beyond normal lad-

der reach? Are they properly located over the carrier's route structure?

(8) Are the special tools required for the job available? Are they in usable condition? Engine overhaul? Instrument? Electrical/ Electronics? Airframe repair? Accessory overhaul?

(9) Is special balancing and testing equipment available? X-ray? Magnaflux. Other?

(10) Does carrier do plating? Are the standards used for this work satisfactory? Is the work contracted? Does the contractor's equipment meet the standards set for the specific work he performs? What systems does the carrier have to ascertain the contractor has adequate instructions, tools, equipment, personnel, etc., to perform a particular job?

(11) Are individual mechanics required to have minimum tools? Are they adequate?

(12) How does carrier control the quality of fuel and oil purchases? Do they meet manufacturer's specifications?

(13) Who controls the purchasing of parts and supplies? To whom do they answer?

350. *PERFORMANCE ANALYSIS* is a function of the overall maintenance system which evaluates product performance and identifies problem areas.

a. It detects deficiencies, signals the need for corrective action, and monitors the effect of the action. It provides inputs to the engineering department to effect modification, to quality control to provide standards, to inspection to revise techniques, to production control to provide rescheduling, etc. Inherent in this activity is data collection and technical investigation.

b. Needless to say, an analysis of the procedures and control exercised by this organization and the effectiveness of their coordination with other organizational elements should be carefully considered. Following are typical questions for analysis in this area:

(1) What is the source of basic information on service difficulties? Is there more than one source? What are they? Are any useful sources being overlooked or omitted?
(2) Are there adequate instructions for completion of reports on service difficulties? Are they understandable? Are they usable? Are they followed?
(3) Is there a system for reporting difficulties encountered during operation of aircraft? During overhaul? During routine inspection?
(4) Is responsibility for reporting difficulties spelled out in sufficient detail to be meaningful?
(5) Who is this information directed to? Do they get it all?
(6) Does each department receive and analyze its own difficulties? How are upper echelons advised of how the operation is going?
(7) Are personnel analyzing difficulties capable and trained to perform this function?
(8) What is required to initiate corrective action once a problem has been identified? Is the responsibility for implementing this requirement spelled out?
(9) What use is made of industry's problems in analyzing the difficulties being experienced by the air carrier?
(10) Are fixes established based on problems being encountered by industry before they occur on the carrier being analyzed? Are MRR reports used for this purpose?
(11) Are boards of inquiry established for major problem areas such as engine failures, structural failures, etc.? Who makes up this board?

351. *MAINTENANCE PERFORMANCE.* Maintenance performance is the function generally referred to as "maintenance" and includes responsibility for actual work processes of overhaul, repair, alteration, ad-

justment, and checks of the aircraft and its systems and components.

b. The maintenance performance organization must possess capability through adequate facilities, competent personnel, practical instructions and procedures, attainable standards, and effective controls regardless of variations in size and complexity. Careful evaluation of these factors is essential to a successful analysis of the maintenance function. The following questions are directed toward making such a determination:

(1) What is the line of authority and responsibility of mechanics? What is relationship of maintenance organization to purchasing, training, inspection, engineering, and production control? Where in the organization do these segments answer to a common head?
(2) Under what condition can "maintenance" deviate from published standards?
(3) What level of supervision can fire and hire? Issue reprimands for record?
(4) What is general level of mechanic intelligence as indicated by his educational background, formal schooling, trade schools, etc.? What is mechanic expected skill level as indicated by his experience with the company and with industry? Are mechanics assigned work on a specialist's concept? How many mechanics are certificated?
(5) Are adequate tools, manuals, and facilities available?
(6) Are contract mechanics used at line stations?
(7) What is source of newly hired mechanics? Do mechanics move about system?
(8) Is there a system established by which a deficiency found by mechanics can be made known to personnel with authority for having it corrected.

352. *INSPECTION.* Inspection is the function which, through processes of examination, measurement, and test, confirms that the product conforms to established standards. The inspection department is usually a distinct segment of the carriers' overall maintenance organization. It should be unencumbered with countermanding authority from other segments or functions. Competent and adequate staffing is essential and proper tooling, equipment, facilities, and instructions are required. Close alliance or actual integration with the quality control organization is a common situation. Special attention in the analysis of the inspection function should be given to ascertain the organizational level at which it is separated from the various production functions. Typical questions for the analysis of this area are:

(1) What system has been devised by the air carrier that integrates the findings of the inspection department into the aircraft's work program?
(2) Is the inspection organization separated from the production organization? At what level does inspection and production come under a common head?
(3) What is organization set up for lower echelons? How many inspectors work for a single supervisor?
(4) How are inspectors selected?
(5) What type of maintenance checks require the services of the Inspection Department? Where are these maintenance checks conducted?
(6) Do inspectors accomplish receiving inspection? 100 percent? How are new or reworked parts selected for inspection?
(7) Is there inspection representation at contractor's facilities?
(8) What type jobs are "double inspected" by inspectors?

(9) What checks or maintenance operations are inspectors using as "work finders"?

(10) What maintenance operations are "bought back" by inspectors?

(11) What system is employed that assures a completed airplane is released to flight operations after an overhaul or heavy check has been performed? Has the system proved workable, practical, and foolproof?

(12) Do such functions as engine overhaul, instrument, radio overhaul, etc., have inspectors specializing in these areas assigned? How are they selected?

(13) What inspection responsibilities have been delegated to production personnel? How is it controlled?

(14) How is the maintenance release accomplished after overhaul? After heavy check? After a complicated component change or repair?

(15) Are personnel releasing to service propellers and instruments out of overhaul properly certificated and rated (Repairman Certificate)?

353.-399. *RESERVED.*

CHAPTER 6. AIR CARRIER OPERATIONS SYSTEMSWORTHINESS ANALYSIS PROGRAM

400. *PURPOSE.* This section provides guidance and procedural instructions applicable to the Operations Systemsworthiness Analysis Program, a subsystem within the Flight Standards Systemsworthiness Analysis Program.

401. *OPERATIONS SYSTEMSWORTHINESS ANALYSIS AREAS.*

a. *Analysis Areas.* The areas of the air carrier operations system selected for analysis are listed below. They should be scheduled to assure that all areas are analyzed at least annually. The

six areas are broken down in order to show important subareas under each which should be evaluated during analyses:

(1) *Flight Crew Training.*

(a) Training records.
(b) Quality of end product—as determined by sampling flight checks and en route inspections.
(c) Simulator training including procedural trainers.
(d) Emergency procedures training.
(e) Flight and ground instructors.
(f) Training manuals and aids.
(g) Training curriculum—Initial, upgrad- and recurrent.
(h) Differences training.
(i) Initial flight assignments—pilots and flight engineers.

(2) *Non-Flight Crew Training.*

(a) Training records.
(b) Quality of end product.
(c) Emergency Procedures Training—Flight Attendants and Dispatchers.
(d) Instructors.
(e) Training manuals and aids.
(f) Training curriculum—Initial and recurrent.
(g) Differences training—Flight Attendants and Dispatchers.
(h) Initial flight assignments—Flight Attendants and Dispatchers.

(3) *Facilities.*

(a) Communications.
(b) Dispatch and MET.
(c) Line Stations.
(d) Airports.
(e) Company-owned NAVAIDS.
(f) Flight following.
(g) Training.

(4) *Flight Operations Policies and Procedures.*

(a) Line operations.
(b) Training.
(c) Dispatch/flight following.
(d) Management control.
(e) Operational control.
(f) Manuals and bulletins.
(g) Route and airport qualification—pilots and dispatchers.

(5) *Air Carrier Records and Crew Scheduling.*

(a) Training records.
(b) Crewmember and dispatcher records.
(c) Trip papers (Load manifest, release, etc.)
(d) Operations forms.
(e) Communications records.
(f) Crew scheduling records and procedures.
(g) Financial records—commercial operators.
(h) Checklists and minimum equipment lists.

(6) *Check Airmen and Examiners.*

(a) Qualifications.
(b) Training.
(c) Quality of end product.
(d) Manuals and instruction.

b. *Preparation and Planning.* The Systemsworthiness Analysis team should first review and become familiar with the operator's policies and procedures as they pertain to the area to be analyzed and as set forth in his manuals. The objective of this review is to determine whether or not company policies and procedures are consistent with the provisions of the Federal Aviation Regulations, operating certificate, and operations specifications.

c. *Inspection Procedure.* Following this review the team determines whether or not the actual operation is in accordance with company policies and procedures, the FARs, and operations specifications by any or all of the following means:

(1) On-site inspections of facilities.
(2) Sampling en route inspections.
(3) Sampling training flights and flight checks.
(4) Discussions with the operator's personnel.
(5) Records review.
(6) Records and manual cross-checking.
(7) Verification of operational problems by checking ATS facility records.
(8) Violation review.
(9) Accident and incident review.
(10) Review of ACDO correspondence.
(11) Discussions with ACDO personnel.
(12) Financial evaluation.
(13) Checking compliance disposition and qualifications of company officials and airmen using Compliance and Security investigators, auditors, and Regional Counsel as deemed necessary.
(14) Discussions with ATC personnel and other operators.
(15) Meet with principal inspectors and local representatives of airmen organizations to discuss any items of mutual interest.
(16) Any other source of information pertinent to the analysis.

d. *Operator Policies and Procedures.* The analysis team should be able to distinguish company policy from company procedures.

(1) *Company policy* is made by top-level management, usually by the President or a senior operating official by delegation. This may vary of course depending upon the size of the company. Company policy is implemented by procedures established by company middle management officials such as

the Operations Manager, Assistant Vice President of Operations, the Chief Pilot, etc., which again will vary depending on the size of the company. A review of company policy by the analysis team could well reveal that company policy is consistent with FAA requirements, but a review of company procedures might indicate them to be contrary to company policy.

(2) *On the other hand*, both policies and procedures could be found to be in conformance with FAA requirements, where as the operator's practices are not. It is the responsibility of the operator's management to carry out company policies and procedures in accordance with regulatory requirements. If this does not result, then there is a breakdown in the operator's management system which could be due to a number of factors such as poor communications, no delegation of authority, lack of follow-up procedures, lack of supervision, or incompetent management personnel.

(3) *Sometimes it is difficult* to distinguish between policy and procedure. Reduced to the simplest terms, an operator's policy, for example, could be to comply with FAR 121, but the procedures prescribed in his manual might permit continuance of flight with certain required items of equipment inoperative.

(4) The following outline summary of the foregoing might be helpful:

(a) Company policy determined by:	Top management
(b) Company policy must be consistent with:	Regulations Operating certificate Economic authority Operations specifications

(c) Company procedures determined by:	Manuals Middle-management decisions Operational performance
(d) Company procedures must be consistent with:	Company policy Regulations Operations Specifications
(e) Company policy carried out by:	Middle management
(f) Company procedures carried out by:	Crewmembers and dispatchers

e. *Inspection Guidelines.* These guidelines are designed to give the inspector a better idea of how the systemsworthiness analysis should be conducted following the policy and procedures review by discussing several (but not all) of the subareas of the six operations analysis areas:

(1) *Flight Crew Training.*

(a) *Training Records.* The inspector should spotcheck the accuracy of the training records of individual airmen by verifying that the training was actually given on the date specified. In the case of flight training this can be done by comparison with the aircraft logbook page pertaining to the date in question. If further checking is necessary, the inspector might consider a review of flight plan information on file at Air Traffic Service (ATS) facilities or interrogation of the airmen concerned.

(b) The inspector should also determine the adequacy of the procedures used for scheduling flight crewmembers for required training and checks. If problems are encountered in this respect, the inspector should discuss the matter with the person responsible for maintainiing the training records. From this dis-

cussion the inspector should determine the source of the problem which might be due to any of the following:

1 The person in charge of the training records does not know his job either through incompetency or he himself has not been properly trained. In either case the matter must be pursued further with higher echelons.

2 Company practice not in conformance with company policies or procedures concerning company records.

3 Incorrect interpretation of regulatory requirements.

4 The recordkeeping system itself is overly complex as to preclude timely scheduling of required training and checks.

(c) *Quality of End Product.*

1 The airmen certification member of the team will conduct sampling en route inspections, observe training flights, conduct or observe a proficiency check, and conduct a type-rating check. It may not be feasible or necessary to accomplish all of these during a normal scheduled analysis which is progressing satisfactorily insofar as the operator is concerned. However, the airman certification inspector will accomplish all of these functions during special analyses of flight-crew training and during scheduled analyses if this area becomes suspect.

2 It is desirable, but not necessary, that the airman certification inspector member of the team be rated in the aircraft type when conducting en route inspections, observing training flights, or observing proficiency flight checks during either special or scheduled analyses.

However, he must be qualified and current in a comparable type aircraft. For the purpose of this handbook comparable type aircraft are:

a Any 3- or 4-engine airline jet.
b Any 2-engine airline jet.
c Any airline turboprop.
d Any airline 4-engine piston.
e Any airline 2-engine piston-tricycle gear.
f Any airline 2-engine piston-tailwheel gear.

3 In all cases where the airmen certification inspector conducts proficiency checks or type rating checks he shall be type-rated and current in the aircraft type used for such checks. In order to comply, the regions may have to temporarily detail additional airman certification inspectors to the analysis team. However, they may be released to their normal duties after briefing the analysis team concerning the results of the sampling checks. Whenever problems are encountered in any sampling check, en route inspection, or training flight, the team must trace the problem to its source, determine the cause, and take corrective action (immediately, if necessary) through the principal inspector. However, if there is no immediately safety problem, the matter should be handled after the analysis has been completed.

4 Deficiencies revealed during the sampling process might be caused by any of the following:

a The airman did not receive adequate training which in turn might be due to inadequate instruction.

b The airman is unable to remain proficient between required training periods. If this is the case, a reexamination of the airman is in order.

c It may be only a simple case of "check-itis."

d Training policies and procedures are inadequate which could either require immediate action through the principal inspector or action following completion of the analysis depending upon the circumstances.

(2) *Non-Flight Crew Training.*

(a) *Emergency Procedures — Training — Flight Attendants.*

1 The inspector during the sampling en route inspections should determine the knowledge of the flight attendants concerning emergency equipment and emergency evacuation procedures. These discussions might reveal deficiencies in the operator's training program, in which case follow-up action with the operator is required.

2 Team members should review the description in the operator's manual concerning the emergency and emergency evacuation duties assigned to flight attendants to determine compliance with regulatory requirements. Deficiencies in this area will require corrective action either immediately or after completion of the analysis, depending on the severity of the deficiency.

(b) *Training Curriculum—Flight Attendants.* Team members should determine whether the training curriculum meets the requirements for initial and recurrent training prescribed in FAR 121.424 as well as the initial and recurrent emergency procedures training

prescribed in FAR 121.416. This should be done by a review of the operator's approved training program and whenever feasible by observing classroom instruction, emergency drills, passenger briefing procedures, and by discussions with individual flight attendants. If a problem area is suspected and the operator has no classes or drills scheduled, team members should interview an appropriate member of flight attendants, instructors, as well as ACDO personnel. If a deficiency is suspected concerning emergency evacuation procedures, it might be appropriate to require the operator to conduct an emergency evacuation drill of a representative number of flight attendants. In more serious cases an emergency evacuation demonstration might be in order.

(c) *Training Curriculum—Ground Station Personnel.* Although not required by regulation, many operators conduct formal training of ground station personnel. Team members should review the training curriculum applicable to dispatch clerks and personnel computing aircraft weight and balance data. If feasible, observations should be made of classroom instruction. Perhaps the most significant aspect is the checking of load manifests for accuracy. If a problem area is disclosed with respect to the preparation of load manifests, the team should interview loading clerks and review manual instructions. The source of deficiencies in the preparation of load manifests might be:

1 Incompetence or lack of training of load clerks. In either case, the matter

should be discussed with higher echelons.

2 Inadequate instructions which should be followed up immediately if the instruction results in inaccurate load manifests.

3 Unnecessarily complex weight and balance procedures. If such results in inaccurate load manifests, immediate corrective action is required.

(3) *Facilities.*

(a) *Communications.* Determine whether company communications facilities provide adequate communications between the dispatch centers and aircraft in flight. The best and most practical ways of determining this are through personal observations during en route inspections, discussions with crewmembers, and most importantly, through discussions with working dispatchers. If deficiencies are disclosed, the team will consult with the principal operations inspector to determine the required course of corrective action. Corrective action will be initiated through the principal operations inspector either immediately or following the systemsworthiness analysis. In the latter case, the principal operations inspector should handle the matter during the post-inspection briefing of the operator.

(b) *Dispatch and MET.*

1 This area can best be handled by one, or at the most, two members of the Systemsworthiness Analysis team. This inspection should also encompass dispatch procedures which is a sub-item under the Policy and Procedures Analysis Area. The dispatch center is the

initial focal point at which all operations policies and procedures are translated into action. Prior to the inspection, it is most important that the inspector carefully review the dispatch policies and procedures prescribed in the air carrier's manual. The on-site spection should entail as a minimum a complete 8-hour shift at the dispatch center during peak periods and during IFR weather conditions if possible. The inspector should observe pilot briefings and debriefings with particular emphasis on the terms and conditions of the dispatch release. Considerable time should be spent in observing flight-following and in discussions with working dispatchers. During the visit, the inspector must carefully note whether the dispatcher function as carried out in practice is consistent with company policies and procedures.

2 The inspector should determine whether dispatcher workload has any effect on safety. In this regard, note whether dispatchers are required to perform an excess amount of non-dispatch functions such as crew scheduling, clerical duties, relaying messages, etc. Additionally, determine that dispatchers are not being required to handle too many flights.

3 Particular attention should be given to the procedures followed in the dispatch of a flight to determine whether the dispatcher is sharing responsibility with the pilot in the release of the flight considering turbulent weather conditions, information on navigation facilities, airports, and compliance with the minimum equipment list. Also, that during flight the dispatcher provides the pilot with any additional available

information which may affect the safety of the flight.

4 Determine the adequacy of the operator's system for restriction or suspension of operations in conditions that are a hazard to safe operations.

5 During visits to air carrier dispatch offices, inspectors should meet with individual dispatchers to obtain an impression of the dispatchers' knowledge of regulatory requirements and discuss mutual problems and possible solutions. Deficiencies might be caused by:

a Lack of knowledge of individual dispatchers which could be due to a lack of training or incompetence. In either case, pursue the matter further at higher echelons.

b Inadequate company policies and/or procedures. Corrective action should be initiated through the principal inspector immediately or at the conclusion of the systemsworthiness analysis as dictated by the severity of the deficiency.

c Incorrect application of regulatory requirements. In this case, immediate corrective action may be in order.

d Inadequate meterological information which again may require immediate action.

e Inadequate company communications—See subparagraph (3) (a) of this paragraph.

(4) *Flight Operations Policies and Procedures.*

(a) *Line Operations.* During the sampling en route inspection, the inspector can verify whether company policies and procedures as prescribed in the operator's manual are carried out in actual practice. For example:

1 He should determine whether the flight was properly dispatched or released

(supplemental air carriers and commercial operators). An important aspect of the dispatch/release procedure is a determination that the flight was dispatched in accordance with the applicable airplane performance requirements. This factor should be carefully examined in the case of off-route charter flights by scheduled air carriers and operations conducted by supplemental air carriers and commercial operators. The obvious question here is: If the operator has rarely or never operated into the particular airport, how does he obtain obstruction clearance data in order to comply with the takeoff and landing distance requirements?

2 Particular attention should also be paid to the operator's method of complying with the "wet" runway landing distance requirements. Again this question is particularly pertinent in nonscheduled type operations.

3 It may be necessary to obtain engineering assistance in evaluating the procedure used by the operator in complying with the airplane performance requirements.

4 Deficiencies in procedures used to meet airplane performance requirements might be caused by any of the following:

a Incorrect application of regulatory requirements. In this case, immediate corrective action may be in order.

b It is more profitable for the operator not to comply. In this case, immediate corrective action is required.

c Operator's computations are incorrect. In this case, engineering assistance will be required and immediate corrective action is required.

(b) *Management Control.* This is one of the most important aspects of the systemsworthiness analysis. A good axiom is: competent management usually results in a safe operation. The person ultimately responsible for conducting a safe operation is the president of the company. Obviously, in a large company the president must delegate authority down through the chain of command. It is important, therefore, that the principal inspector, during his briefing of the Systemsworthiness Analysis team, outline the duties and responsibilities of key company officials. The guidance material contained in Section 205.c. of Chapter 4 of this handbook should be used in evaluating this area. See also Section 401.d. of this Chapter. Deficiencies in this area might be caused by:

1 *Incompetent management.* This deficiency is usually reflected in the operator's compliance and/or safety record and immediate corrective action is in order.

2 *Misinterpretation* of company policies by personnel at middle management or working level. Corrective action here might require additional training, recasting of company policy, or revision of company procedures to conform to company policy. The immediacy of the corrective action would depend upon the degree of severity.

3 *Lack of communication* down through the chain of command. This might also indicate that management is not monitoring performance at the lower management levels and initiating timely corrective action. Again, the immed-

iacy of corrective action would depend upon the circumstances.

(5) *Air Carrier Records and Crew Scheduling.*

(a) *Crewmember and Dispatcher Records.* The inspector should verify the accuracy of these records by cross-checking with other records in the manner suggested in subparagraph e.(1)(a) of this Section.

(6) *Check Airmen and Examiners.*

(a) *Quality of End Product.* The inspector should review the flight-checking records of company check pilots to determine whether certain check pilots either give a high percentage of down checks or never give a down check. These records should be compared with those flight checks conducted with an FAA inspector on board. Any significant differences in the percentage of down checks between individual check pilots, company check pilots and FAA inspectors; or individual FAA inspectors must be resolved. If a significantly high or low percentage of down checks is apparent it is apparent it might be caused by:

1 If high, company training program may be inadequate. In such a case immediate corrective action is in order.

2 If high, company check pilots or FAA inspector are demanding too much, e.g., compounding emergencies.

3 If low, could well be due to an excellent training program. In such a case, the inspector should note the good features for his own education and future reference.

4 If low, check pilots too lenient, thus immediate corrective action is required.

402. *CORRECTIVE ACTION.*

a. When corrective action is required during or subsequent to the systemsworthiness analysis, it normally will be initiated with the operator through the principal inspector. The team will only initiate corrective action when required by unusual circumstances, or if directed to do so by higher authority.

b. In considering corrective action it goes without saying that no distinctions will be made with respect to the class of operator involved. Except for regulatory requirements pertaining to dispatch, communications, and pilot route and airport qualifications; a small commercial operator or supplemental air carrier must comply with the same safety standards that are applicable to a large scheduled air carrier. Further, the identical standards applicable to supplemental air carriers and commercial operators are also applicable to off-route charter flights conducted by scheduled air carriers.

403.-499. *RESERVED.*

CHAPTER 7. GENERAL AVIATION SYSTEMSWORTHINESS ANALYSIS

SECTION I. IMPLEMENTATION

500. *PURPOSE.* This section provides guidance and instructions for implementation of the General Aviation Systemsworthiness Analysis Program.

501. *SCOPE.* Systemsworthiness Analysis methods are applicable when it can be expected that:

a. A higher level of safety can be achieved.
b. Greater efficiency in the utilization of manpower can be realized.
c. Presently scheduled surveillance inspections can be appreciably reduced.
d. Closer standardization can be attained.
e. Faster detection and correction of deficiencies may be provided.

502. *PLAN.* Implementation will be accomplished on a gradual and orderly basis in three phases.

503. *PHASE I.* Phase I begins October 1, 1969, by which date it is expected that each region will have personnel selected for temporary team assignment, a temporary schedule established, and be ready to conduct general aviation systemsworthiness analysis.

a. *Team organization.* Team organization in regard to size, composition, supervision, location, and structure will be the prerogative of each regional director. In any case, however, the SWAP function will be responsive to the regional Flight Standards Division Chief.

b. *Transfor of work function.* Since Phase I will be a gradual buildup of effort and effectivity, transfer of inspector work functions either partially or completely to the SWAP team will be determined by each region based on its own particular circumstances.

504. *PHASE II AND III.* Phase II and III instructions will be provided at a later date.

505-509. *Reserved.*

SECTION 2. GENERAL AVIATION MAINTENANCE AND OPERATIONS

510. *ANALYSIS PROCESS.* The General Aviation activities which are adaptable to SWAP, such as air taxi and commercial operators, certificated repair stations, and airmen schools, all have certain basic similarities which may be used for separating and scheduling the analysis function into four primary areas.

a. Standards and Procedures.
b. Quality Assurance.
c. Equipment and Facilities.
d. Personnel and Training.

Each area can generally be associated with regulatory requirements for the various aviation functions to which SWAP will be applied.

511. *GENERAL.* Guidance material is provided in the following paragraphs to assist SWAP team members in their analysis of various kinds of general aviation activities.

a. *Standards and Procedures.* This basic area includes the operator's system for establishing what he is going to do and how he is going to do it. Where manuals are required by regulation, this is the area which includes responsibility for their publication, accuracy, adequacy, distribution and revision status. This area also includes the operator's system for establishing and disseminating policy and guidelines for management decisions affecting flight safety and airworthiness. Since this area constitutes management's communication network, close attention should be given to the structure, responsibilities, staffing, and facilities.

In analyzing this area, it is important to bear in mind that individual discrepancies are usually indicators of system breakdown. When manuals are found with obsolete pages, SWAP should be concerned with the lack of management control which allowed this condition to exist. SWAP should be alert to situations where responsibilities and authority in regard to airworthiness determinations, etc., are not clearly delineated. Where procedures for work performance, inspection, testing, etc., are inadequate or erroneous, SWAP should be concerned with the qualifications, staffing, supervision, and control of the people and system which produce the procedures. The following type questions will serve as probes for analyzing the standards and procedures area:

(1) What manuals and other written policy, information, and procedural material is provided by the operator?
(2) Who is responsible for the development, preparation, and distribution of the material?
(3) Is there a method for feedback to indicate the adequacy of the existing instructions, that they are understood, that they are correct? Does the feedback system show where policy definition is needed?
(4) Is authority for deviation from policy clearly spelled out?
(5) Is published material made available to all the working levels? Is it legible? Properly revised?

b. *Quality Assurance.* This basic area includes all functions and activities directed toward assuring that work performed and services rendered are done so in accordance with the operator's policies, procedures, instructions, and in accordance with the applicable federal regulations. This includes the system by which the operator assures that its product conforms to an established standard. "Product" here is used in its broad sense. "Product" may mean an overhauled component, an installed modification, a trained airman, a repaired aircraft, etc.

A specific organizational segment may be responsible for this function. These units may be called a student review board, an inspection department, quality control department, technical compliance, etc. Regardless of the product and of how formally structured this function is, the basic essentials are the same. Some considerations are:

(1) Does the system assure that work or service is performed in accordance with the operator's standards? Is there feedback to determine if these standards are adequate?

(2) Does the system assure that proper tools are used, competent people are employed, adequate instructions are available, required records are kept, adequate supervision exists, etc.?
(3) Does the system provide for personnel safety and working conditions?
(4) Does the system develop test procedures? Are the tests valid? Are the results fed back as indicators of procedural, personnel, or equipment deficiencies?
(5) Does the system provide for traceability of items requiring calibration; how is this controlled? What standard is used?
(6) Where is the separation between quality control, inspection, and management? At what level does production and inspection separate?

c. *Equipment and Facilities.* This analysis area includes those organizational elements responsible for providing tools, classrooms, materials, shops, supplies, parts, and any other article or commodity, except people, used in the operator's "production" process. This function is also responsible for maintaining the condition and adequacy of these "production tools." Where the previous two areas have been concerned with "what is done" and "how well it is done," this area assures the wherewithall to actually do the job. Analysis in this area should consider:

(1) Do the facilities and equipment meet the regulatory requirements? Who is responsible?
(2) How is the need determined for equipment such as shop tools, training aids, spare parts, safety equipment, copies of manuals, torque wrenches, mockups, etc.?
(3) In the case of flight and mechanic schools, who assures the adequacy of classrooms, texts, materials, shop equipment?

(4) Who assures that the equipment is maintained and available?
(5) Where operators make use of aircraft as in the case of an air taxi and flight schools, are the maintenance arrangements adequate? How does the operator know?
(6) Are recordkeeping provisions adequate?
(7) Is there an organizational element responsible for work scheduling? Does the system assure that required inspections are accomplished on time?

d. *Personnel and Training.* This very important analysis area encompasses the total human element. It is concerned with both the quantity and quality of people. It includes availability, qualifications, competency, certificate requirements, direction, and training of the operator's personnel. Basically, the concern here is "are there enough competent people to do the job?"

In many cases, the Federal Aviation Regulations are specific in the requirements for certificated people, training programs, supervision, inspection authorization, etc. In other cases, personnel requirements are implied by requirements for "inspection systems," etc.

Some considerations in the personnel and training area are:

(1) Does the operator's training program meet the intent of the regulations?
(2) Is there a system for recording employee's qualifications and training?
(3) Is there a feedback system to indicate need for training, need for additional personnel, need for changes in supervision?
(4) Is on-the-job-training conducted by qualified persons?
(5) Where in the organization does the training department fit? To whom does it answer?

(6) Are there provisions for recurrent training?

(7) Are there provisions for non-technical training to upgrade supervision, instructors, manual writers, etc.?

(8) Is there an orientation program for new employees? Any provisions to acquaint employees with federal regulations?

(9) Are there sufficient personnel to accomplish the work functions? Are they provided sufficient time to properly accomplish inspections, troubleshooting, and to execute adequate records?

(10) Are there duty time limitations? To what extent do the employees moon-light? What is operator's policy regarding moon-lighting?

512. *SUMMARY* The preceding paragraphs are intended only as guides. Analysis should not be confined to just these considerations. Reference should also be made to the air carrier analysis guidelines and procedures in Chapters 5 and 6 for additional guidance as applicable especially where an ATCO operation under Part 135 is involved. Team experience, however, will be the best indicator of the "what, where, and how" of Systemsworthiness Analysis.

513.-519. *RESERVED.*

AIR TRANSPORT ASSOCIATION OF AMERICA
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

December 4, 1970

Mr. George S. Moore
Associate Administrator for Operations
Federal Aviation Administration
800 Independence Ave., S.W.
Washington, D.C. 20590

Re: Public Disclosure of Systemsworthiness Analysis Program (SWAP) Findings

Dear Mr. Moore:

The airline members of the Air Transport Association strongly urge that no public disclosure be made of Systemsworthiness Analysis Program (SWAP) findings. To that end, we hereby request the Administrator to issue an order, pursuant to Section 1104 of the Federal Aviation Act of 1958, directing that SWAP information be withheld from public disclosure.

As has been set forth by the FAA in a memorandum to its regions dated February 7, 1967, "The SWAP Program requires a cooperative effort on both the part of the company and FAA if it is to work effectively." Information freely given to the FAA SWAP team by air carrier management personnel is not specifically required by the FAR's.

If public disclosure of the SWAP reports were made, the interests of aviation safety would be in danger of being subordinated in some degree to legal considerations in the presentation of information to the FAA. The present practice of non-public submissions, which includes even tentative findings and opinions as well as certain factual material, encourages a spirit of openness on the part of airline management which is vital to the promotion of aviation safety—the paramount consideration of airlines and government alike in this area.

It is submitted that any negative influence on our continuing program to improve aviation safety would by definition adversely affect the interests of the airline members of the Air Transport Association and be manifestly contrary to the public interest. Therefore, we respectfully request that SWAP reports be withheld from public disclosure.

Attached is a list of ATA members which have authorized us to make this request in their behalf.

Sincerely,

(Signed) Clifton F. von Kann
CLIFTON F. VON KANN
Senior Vice President
Operations and Airports

Attachment
bcc: Mr. George U. Carneal-
General Counsel—FAA

Air West, Inc.
Alaska Airlines, Inc.
Allegheny Airlines, Inc.
Aloha Airlines, Inc.
American Airlines, Inc.
Braniff International
Continental Air Lines, Inc.
Delta Air Lines, Inc.
Eastern Air Lines, Inc.
The Flying Tiger Line, Inc.
Frontier Airlines, Inc.
Hawaiian Airlines, Inc.
Mohawk Airlines, Inc.
National Airlines, Inc.
New York Airways, Inc.
North Central Airlines, Inc.
Northeast Airlines, Inc.
Northwest Airlines, Inc.
Ozark Air Lines, Inc.
Pan American World Airways, Inc.
Piedmont Airlines, Inc.
Reeve Aleutian Airways, Inc.
Southern Airways, Inc.
Texas International Airlines, Inc.
Trans World Airlines, Inc.
United Air Lines, Inc.
Western Air Lines, Inc.
Wien Consolidated Airlines, Inc.

DETERMINATION NOT TO RELEASE SYSTEMSWORTHINESS ANALYSIS PROGRAM REPORTS

By letter dated 4 December 1970, the Air Transport Association of America requested, on behalf of 28 of its member airlines listed below, that the Systemsworthiness Analysis Program (SWAP) Reports relating to those airlines should not be disclosed to the public. Having considered this request, I, John H. Shaffer, pursuant to the authority granted to me as Administrator of the Federal Aviation Administration by Section 1104 of the Federal Aviation Act of 1958 (49 U.S.C. 1504) and the delegation to me by the Secretary of Transportation (49 CFR 1.47(a)), hereby determine that Systemsworthiness Analysis Program Reports shall be withheld from public disclosure. In my judgment, the disclosure of the information contained therein would adversely affect the interests of the airline being investigated and is not required in the interest of the public. This determination is effective for all SWAP reports in existence or hereinafter to be made, regarding the following listed airlines who have authorized the Air Transport Association of America to request non-disclosure:

Air West, Inc.
Alaska Airlines, Inc.
Allegheny Airlines, Inc.
Aloha Airlines, Inc.
American Airlines, Inc.
Braniff International
Continental Air Lines, Inc.
Delta Air Lines, Inc.
Eastern Air Lines, Inc.
The Flying Tiger Line, Inc.
Frontier Airlines, Inc.
Hawaiian Airlines, Inc.
Mohawk Airlines, Inc.
National Airlines, Inc.
New York Airways, Inc.
North Central Airlines, Inc.
Northeast Airlines, Inc.
Northwest Airlines, Inc.
Ozark Air Lines, Inc.
Pan American World Airways, Inc.
Piedmont Airlines, Inc.
Reeve Aleutian Airways, Inc.
Southern Airways, Inc.
Texas International Airlines, Inc.
Transworld Airlines, Inc.
United Air Lines, Inc.
Western Airlines, Inc.
Wien Consolidated Airlines, Inc.

(signed) John H. Shaffer
John H. Shaffer
Administrator
Federal Aviation Administration
Washington, D.C. 20590

(dated) 18 Feb. 1971

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 1970-71

REUBEN B. ROBERTSON, III, ET AL., PLAINTIFFS

—*v*—

JOHN H. SHAFFER, ET AL., DEFENDANTS

STATEMENT OF GENUINE ISSUES

Plaintiffs respectfully submit that genuine issues exist as to assertions of fact and conclusions of law contained in paragraphs 7, 8, 11, 12, 13, 16, and 17 in the Affidavit of Defendant Shaffer concerning the SWAP Reports and paragraphs 8, 10, 11, 13, 14, 15, and 17 through 22 of the Affidavit of Defendant Shaffer concerning MRRs.

James R. Michael
1237 - 22nd Street, N.W.
Washington, DC 20037
(202) 785-0797 OR (202) 833-3400
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 1970-71

REUBEN B. ROBERTSON, III, ET AL., PLAINTIFFS

—*v*—

JOHN H. SHAFFER, ET AL., DEFENDANTS

PLAINTIFFS' STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

The material facts as to which there is no genuine issue are stated in Government's Admissions of fact and genuineness of documents (Nos. 1-135) filed heretofore in this action, which have been made upon demand by Plaintiffs pursuant to Rule 36 of the Federal Rules of Civil Procedures, and in those paragraphs of Defendant Shaffer's affidavits on MRRs and SWAP Reports which Plaintiffs do not contest, and in the Affidavit of Plaintiff Robertson submitted in support of Plaintiffs' motion for summary judgment, and are incorporated herein by reference.

James R. Michael
1237 - 22nd Street, N.W.
Washington, DC 20037
(202) 785-0797 OR (202) 833-3400
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1970-71

REUBEN B. ROBERTSON, III, ET AL., PLAINTIFFS

v.

JOHN H. SHAFFER, ET AL., DEFENDANTS

RESPONSE TO PLAINTIFFS' STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Federal defendants believe that, on their statement of material facts, as properly supported under Rule 56, they are entitled to summary judgment. There is no issue as to any material fact that would stand in the way of summary judgment for the federal defendants.

With that preliminary observation, we have the following response to plaintiffs' statement of material facts.

1. Plaintiffs' refer to the "Government's Admissions of fact and genuineness of documents." Plaintiffs filed their requests *after* they filed a motion stating that there is no genuine issue of material fact and seeking judgment. It is extraordinary that plaintiffs now claim that matters as to which they requested admission only subsequent to making their motion, are material to their motion.

2. The Federal defendants have asked the Court to stay discovery, so that they need not answer or object specifically to plaintiffs' discovery at this time, including the request for admissions. Accordingly, we cannot accept the requests for admission as stating material facts.

3.A. With respect to plaintiff Robertson's affidavit we do not accept it as correctly stating material facts in this case to the extent it: states matters not shown to be within Mr. Robertson's personal knowledge; states matters contradicted by properly supported materials submitted by federal defendants; relies on materials not shown to have been properly made part of the record in

this case. For example, in paragraph 3, the Robertson affidavit, in referring to matters "required to be reported" fails to refer to the discretionary category of MRRs. See paragraph 6, Shaffer affidavit. Paragraph 4 states Mr. Robertson's opinions concerning MRRs. We do not accept this paragraph as stating material facts in this action. Moreover, we note with regard to this paragraph, that this case involves withholding of MRRs submitted on or before February 18, 1972, and MRRs submitted after that date in open status. Mr. Shaffer has stated: Often MRRs contain raw unanalyzed data concerning the malfunction. Because of the time-critical reporting requirement [49 CFR 121.703(d)], the information is often incomplete or based upon a preliminary investigation. It would be very misleading for the public to receive this raw unevaluated data. Par. 8. The use to which Mr. Robertson states he would put MRR information—and he does not exclude *open* MRR information—underscores the validity of Mr. Shaffer's judgment under Section 1104 as to the public interest.[1]

B. With respect to Mr. Robertson's paragraph 5, the federal defendants respectfully refer the Court to the government's papers for a precise statement of distribution of MRRs. See, e.g., Shaffer affidavit on MRRs, paragraph 21. We do not accept plaintiffs' paragraph 6. For example, the second sentence is stated to be on information and belief and is contradicted by Mr. Shaffer. Paragraph 17, SWAP affidavit.

C. We do not accept as material facts Mr. Robertson's assertions in paragraph 5 that he attaches a "typical" MRR daily summary; or his assertion in paragraph 6 that he attaches "excerpts from a typical SWAP report"

---

[1] Paragraph 4 is also subject to the defect that Mr. Robertson's statement of opinion does not suggest awareness of the fact that an airline's MRR history may reflect a liberal approach to reporting rather than a maintenance problem. His statement of opinion would seem to suggest to airlines that they keep their number of MRRs down, to have the *appearance* of being safe. Mr. Robertson's opinion does not seem conducive to air safety.

and that this excerpts demonstrate the nature and purposes of these reports.[2]

/s/ _____
HAROLD H. TITUS, JR.
United States Attorney

/s/ _____
JOSEPH M. HANNON
Assistant United States Attorney

/s/ _____
NATHAN DODELL
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing Federal Defendants' Reply Memorandum Affidavit of Robert K. Snyder, Handbook 8000.3C and Response to Plaintiffs' Statement of Material Facts have been made upon plaintiffs by mailing a copy thereof to their attorney, James R. Michael, Esq., 1237 - 22nd St., N.W., Washington, D.C. 20037, and upon co-defendant by mailing a copy thereof to its attorneys, George W. Wise, Esq., Timothy J. Bloomfield, Esq., and David B. Lytle, Esq., 815 Connecticut Ave., Washington, D.C. 20006, on this 11th day of July, 1972.

/s/ _____
NATHAN DODELL
Assistant United States Attorney

[2] The SWAP reports are received by FAA on the basis that they will not be disclosed to the public. The MRRs have been received by FAA on the basis of a limited, specific distribution. In our view, in these circumstances, plaintiffs have not properly made these documents part of the record, without benefit of any ruling by the Court.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 1970-71

[Filed Dec. 12, 1972, James F. Davey, Clerk]

RUEBEN B. ROBERTSON, III, ET AL, PLAINTIFF

vs.

JOHN H. SHAFFER, ET AL, DEFENDANT

NOTICE OF APPEAL

Notice is hereby given this 12th day of December 1972; that Defendants hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 8th day of November, 1972 in favor of plaintiffs against said defendants

---

Harold H. Titus, Jr.
United States Attorney

William A. White
Assistant United States Attorney

Allan B. Morrison, Esq.
2000 P St., N.W., Suite 515
Washington, D.C. 20036

ORDER 8000.3C

SYSTEMSWORTHINESS ANALYSIS PROGRAM

[F.A.A. Seal]

14 Apr 1972

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

Distribution: WRCMFS-3; FFS-1, 2, 3, 5 & 7 (all employees) Initiated by: FS-320 FIA-0 (minimum); AC-955 (80 copies)

FOREWORD

1. *PURPOSE.* This order sets forth the Systemsworthiness Analysis Program (SWAP) as a function of the Flight Standards Service and provides guidance with respect to the following; organization, staffing, coordination, and control of the Systemsworthiness Analysis System.

2. *DISTRIBUTION.* This order is distributed to Flight Standards branch level and above in the headquarters, regions, and Aeronautical Center; to all General Aviation, Air Carrier, Engineering and Manufacturing, and Flight Standards District offices; and to all International and International Aviation Field offices.

3. *CANCELLATION.* Handbook 8000.3B, dated 7/23/69, is cancelled.

4. *PROGRAM RESPONSIBILITY.* The Flight Standards Service is responsible for the overall management of SWAP and shall provide policy, organization, suitable staffing, help and information, sources of help and information, time schedules, and reporting procedures. Each Regional Director and the Assistant Administrator, European Region shall utilize the program in accordance with this revised order.

5. *RESPONSIBILITY FOR ORDER PREPARATION AND AMENDMENT.* The Flight Standards Service is responsible to develop and issue on behalf of the Administrator, National SWAP Policy, standards, plans, goals, suitable staffing, and procedures consistent with that policy. The Maintenance Division, FS-300, is responsible for editing, coordination and clearing the proposed changes with cognizant divisions.

6. *BACKGROUND.* The Flight Standards Systemsworthiness Analysis Program (SWAP) is a systems approach to the conduct of agency responsibilities for the evaluation of commercial aviation opera-

tors. Recognizing that commercial aviation safety is only as good as the management system which produces it, SWAP provides the FAA with an in-depth analysis of these management systems.

7. *PUBLIC AVAILABILITY OF INFORMATION.* This order is in no way restricted, and the employee to whom it is issued will make it available for review by the public upon request. Copies of this order may be obtained (for a nominal fee) by written request to the:

Manager of Headquarters Operations
Department of Transportation
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, D.C. 20591

/s/ J. A. Ferrarese
Acting Director, Flight Standards Service

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CHAPTER 1. POLICIES AND OBJECTIVES

1. *GENERAL.* The Flight Standards Systemsworthiness Analysis Program is a systems approach to fulfill agency responsibilities for inspection and surveillance of operations having formalized systems that cannot be monitored effectively using customary surveillance techniques. It is aimed at determining the casual factors which allow a system to deteriorate rather than the symptoms that are a result of such deterioration. The task of the SWAP team is to supplement the process of surveillance with an indepth analysis of operators' systems and subsystems to determine if system objectives are being achieved. SWAP augments the district office (D.O.) permitting the principal inspector to maintain surveillance of the overall posture of the operator. The key features of the Systemsworthiness Analysis Program are:

   a. *Modifying maintenance and operations surveillance inspection practices* to a comprehensive systemsworthiness concept in order to effect better utilization of district office inspector personnel.
   b. *Utilizing teams of inspectors* to perform programmed and special inspections, to relieve district office inspectors from doing necessary and time consuming indepth analysis.
   c. *Employing sophisticated analytical techniques* on performance and reliability data to better point inspection efforts toward critical areas.
   d. *Defining the relationship and roles of the SWAP and district office inspector* as related to systemsworthiness analysis activities.

2. *MAJOR POLICY OBJECTIVES.* The objectives of the Systemsworthiness Analysis Program are to:

   a. *Provide more efficient* utilization of inspector personnel, both D.O. and SWAP.
   b. *Provide an accurate and penetrating* analysis of all components of the operators' systems.

c. *Improve the quality* of FAA inspections of air carriers, commercial operators, air travel clubs, air taxi operators, repair stations, airmen schools, and other appropriate industry segments.
d. *Improve the effectiveness* of primary agency representatives in the district office.
e. *Reduce* to the maximum extent practicable, in-depth inspections by district office inspectors assigned to an operator to permit these inspectors to maintain surveillance of the overall posture of the operator to determine any sensitive areas which may require examination by the SWAP team.

3. *PROGRAM EFFICIENCY QUALITY.*

a. *More Efficient Utilization of Inspector Personnel*:

(1) By concentrating on significant safety defects, thus getting more out of our safety efforts.
(2) Minimizing frequency of inspections on operators performing satisfactorily.
(3) Permitting flexibility in the deployment of inspectors.
(4) Avoiding inspections by the numbers.
(5) Permitting across-the-board use of scarce technical skills.

b. *Effective Detection and Correction of Defects By*:

(1) Using proven analytical techniques on operator installed systems required by FAR such as MRR, MIS and others.
(2) Conducting periodic systemsworthiness analysis indepth which provides a systematic method for disclosing defects in operations and maintenance programs, determining probable causes and recommending positive alternatives and methods of correction or control.
(3) Allowing principal inspector freedom to more effectively monitor his overall assignment.

c. *Improving Quality and Timeliness of FAA Inspections:*

(1) By using modern systems analysis techniques.

(2) The Systemsworthiness Analysis Program broadens technical competence of FAA inspectors by exposing them to a number of various management systems.

(3) By placing inspector manpower on defective areas of greatest need.

4.-49. *RESERVED.*

CHAPTER 2. ORGANIZATION

50. *MISSION AND FUNCTIONS.* SWAP teams are established as an element to the Flight Standards Division/Staff to perform indepth analyses of commercial aviation operators. The product of the team effort is a report of findings and recommendations and is provided to the air carrier/general aviation district office chief and/or principal inspectors who have responsibility for determining what corrective action is to be taken. To the extent practicable, each region will conduct systemsworthiness analysis of assigned operators on a systemwide basis.

51. *STRUCTURE.* A SWAP team should be established in each region. Regions that do not have an FAR 121/123/127 operator that is subject to a SWAP inspection shall not establish or continue an air carrier SWAP organization. Team members will be responsible to a chief as determined by regional organizational flow chart.

52. *SELECTION PLACEMENT AND DEVELOPMENT OF SWAP INSPECTORS.* Since the success of the Systemsworthiness Analysis Program depends in no small part on the quality of the personnel selected, particular attention should be given to the choice of the team members. In addition to the basic experience and technical qualifications required of an inspector, the following is considered essential:

Basis of Selection.

a. Broad technical training and experience.
b. Indoctrinated in the techniques of Systems Analysis.
c. Demonstrated ability to analyze systems effectively.
d. One year experience in a D.O. at the journeyman level.
e. Demonstrated ability to communicate effectively including oral and written presentation.

53. *PHYSICAL LOCATION.* Each regional director, or the Assistant Administrator, European Region, hav-

ing certificate responsibility, shall determine the location(s) of the SWAP team(s) based on the location of major workload, facilities, travel and per diem requirements, etc. The use of split teams is a prerogative of the regional director and is recommended where efficiency, expenses, team morale, etc., are significant factors.

54. *TEAM COMPLEMENT.* The size and makeup of the team required to perform a scheduled or special analysis will vary depending on the number of functional areas to be covered, the size and complexity of the operator, etc. Team assignments and scheduling are the responsibility of the Chief, Systemsworthiness Analysis.

55. *ORGANIZATIONAL RELATIONSHIP OF SWAP TEAM TO DISTRICT OFFICE.* The team will support the district office by providing reliable reports of facts, analysis and conclusions. The reports are designed to aid district office personnel in their decision making processes.

56. *RECOMMENDATIONS FOR REGULATORY CHANGES.* The SWAP team is in an excellent position for detecting the need for amendments to the FARs. Team members are encouraged to submit proposed changes to the FARs by separate letter to the Regional Chief, Flight Standards Division/Staff for further forwarding to Washington headquarters.

57.-99. *RESERVED.*

CHAPTER 3. HOW SYSTEM FUNCTIONS

100. *SCHEDULED SYSTEMSWORTHINESS ANALYSIS.* Tentative schedule of inspections will be prepared by SWAP covering at least a six-month period and distributed to the district offices.

This schedule will identify the name, address, type of certificate(s) and inspection date of each operator involved. It will also include a procedure whereby necessary coordination between the district office and SWAP is accomplished during the two-week period preceding each inspection.

Every effort will be made to adhere to the published inspection dates. They will be considered firm and changed only after serious consideration and full coordination between SWAP and the district office concerned.

101. *SPECIAL SYSTEMSWORTHINESS ANALYSIS.* Special systemsworthiness analysis will be conducted on an as-needed basis and may be requested by Washington headquarters, the regional office, or district office whenever there are indications that the performance of a particular operator is falling below an acceptable level. The procedures employed are the same as those followed in a scheduled analysis, except that the analysis is concentrated on those areas of operators' systems that are suspected of being deficient. Some conditions that would warrant a request for a special analysis are adverse trends in:

a. *Accidents and incidents.*

b. *Violations and complaints.*

c. *Financial condition.* Scme examples of indications of financial stress that can be detected by inspectors are:

(1) Demands for "cash on delivery" by suppliers who formerly allowed credit.
(2) Curtailment of flight operations.
(3) Significant layoff of personnel.
(4) Significant employee turnover.
(5) Delays in meeting payrolls.
(6) Sale or repossession of aircraft.
(7) Inadequate maintenance of aircraft.

h. Any other factors that could adversely affect the operators' performance or be of assistance to the teams.

104. *OTHER BRIEFINGS.* The inspection team will have free access to manuals, correspondence, and records pertaining to the operator, and any other appropriate data maintained by district offices. All material and data pertinent to the inspection will

be studied by the team to acquaint them with the operator's policies, instructions, and procedures. It is essential that the team has a good working knowledge of the operator's management policies and procedures applicable to the area to be investigated before they meet with the operator. In this manner, the team will be better equipped to discuss intelligently the policies and procedures used by the operator in the direction and control of his enterprise.

105. *INITIAL MEETING WITH THE OPERATORS.*

a. *The district office chief or principal inspector shall arrange* for and chair the initial meeting of the inspection team and the operator. He will explain the purpose and scope of the inspection. In cases where a problem area is suspected to exist, it should be frankly discussed with the operator. This straight-forward approach will help to foster a feeling of mutual trust and respect that is beneficial, if not essential, to the analysis. At this time, the operator will be advised that he will be informed of the team's findings at a meeting to be arranged by the district office at the conclusion of the inspection. The operator should be invited to stipulate any special areas that he would like the team to examine.

b. *The operator should also* be advised that experience has shown that rumors relating to FAA findings while the inspection is in progress are not unusual and should be disregarded. Such rumors usually stem from the searching nature of the questions posed by members of the team. Team members will normally not discuss findings with the operator's personnel during the onsite inspection. However, if a serious safety problem is disclosed during the inspection, the operator and the district office will be informed immediately by the SWAP team of the facts available so that prompt corrective action can be taken.

106. *THE SYSTEMSWORTHINESS ANALYSIS PROCESS.*

a. *As an essential preliminary*, each team member will familiarize himself with the operator's policies, organization, reporting. system (records), and directives which govern the particular area to be analyzed. During the review and analysis, the team member should make notes and references to serve as memory-joggers during the inspection. This will minimize the need for subsequent research manuals, records and files to ascertain a specific practice or directive.

(b) Past inspections have revealed extremely cumbersome or impractical airman records systems. In those cases, inspections have disclosed violations of flight time limitations or faiure to schedule crewmembers for required recurrent training. Past inspections have also disclosed areas where procedures were needed, but none were provided.

(c) It is imperative that the operator has established adequate procedures to monitor compliance with company policy and FAR requirements.

(3) *Fraudulent Records.* When the team suspects that the operator is falsifying his records, assistance by regional Air Transportation and Security, Audit and Legal personnel may be necessary.

(a) A simple cross-checking of company records may reveal discrepancies such as checking aircraft logbooks against training records.

(b) Another technique successfully used in the past has been to check flight plan information available in ATS facilities against company records.

(4) *The art of asking the right question* at the right time and of the right person is one of the key attributes of a successful systemsworthiness ana-

lysis. This art should be employed continuously by team members during an inspection, since it serves to expose abstract areas, confirms or disproves adherence to the established systems, and provides an insight into the acceptance and applicability of established policies and procedures.

d. *Team members* should not confine their inquiries to any particular group of personnel or organizational level. It may be anticipated that supervisory personnel ought to be well-versed in the policies, organization and procedures governing the work functions for which they are responsible. However, they may be unaware of trouble spots existing at lower echelons or shortcuts taken at the working level that may adversely affect compliance with the regulations and accepted standards of safety.

107. *POST-INSPECTION MEETING WITH THE OPERATOR.* The district office chief or the principal inspector shall arrange for, and serve as, agency spokesman in the post-inspection meeting with the operator. All findings discussed at the meeting must be fully supported by facts acquired by the team. However, the operator should be given ample opportunity to present additional facts which he feels mitigate defects found by the inspection team.

108.-199. *RESERVED.*

CHAPTER 4. REPORTING

201. *PRELIMINARY REPORT.* A preliminary report will be prepared by the team following completion of the inspection. This report must be a clear, concise and factual record of the team's findings and discussion. (Section C of the final report format as discussed in this handbook.) The preliminary report may also include other sections of the final report format at the option of the team. Following the SWAP debriefing of the district office, and subject to any changes, the findings and discussion

portion will be contained in the final report. The findings and discussion portion only of Section C may be transmitted to the operator for his official notification.

202. *REPORT OF SYSTEMSWORTHINESS ANALYSIS (RIS: FS 8000-3).*

a. *THE SWAP team report* transmits the findings and recommendations developed during the inspection. It must be so written that the reader understands it, is satisfied that all information has been included, and feels confident that findings are supported by facts. The report should be positive and persuasive rather than negative and fault finding. It should deal in specifics rather than generalities.

b. *Final Report Format and Content.*

(1) *Section A—Foreword.* This section should contain the information concerning the basis upon which the inspection was conducted, what guidelines were followed, and what techniques were used.

(a) *The opening statement* should spellout whether the inspection was regularly scheduled or was the result of a special request. This section should also identify the areas inspected and list the names and titles of Systemsworthiness team members conducting the inspection.

(b) *The last entry on this page* should establish the starting and ending date of the inspection. Normally, the starting date would be the first day the team conducted business at the operator's facilities. The ending date is the date that the team departed the operator's facilities and not the date that the report was completed.

(c) *The Foreword* will normally be limited to one page.

(2) *Section B—Analysis Summary.* The analysis summary should convey to the reader the overall state of health of the operator's major systems inspected.

(a) *During the SWAP inspection,* an analysis is made to determine the effectiveness of related portions of many different systems, policies and procedures used by the operator. The substance of the report (findings) primarily reflects the cause and effect of a breakdown in these various systems and, as such, are critical or subjective in nature.

(b) *It is, therefore, necessary when writing the summary* to utilize the major findings contained in the report and place them in descending order of importance in order to convey a valid picture of the OVERALL status or condition of the operator. If it is found that the operator's systems appear to be effective in conducting their various programs, SAY SO.

(c) *In brief, each or all SWAP findings* in the report should be analyzed in order to determine and consolidate the operator's basic deficiencies, and particularly to HIGHLIGHT PRIMARY CAUSES and effects, such as:

1 Operator's procedures and instructions for systems operation are in need of improvement.

2 The operator's systems procedures and instructions are in need of improved managerial control.

3 Insufficient followup by managers to insure that company policies and procedures are being followed.

(d) *The last portion of this section will* reflect or summarize the net effect that

the deficiencies noted during the inspection have or will have upon economy and safety, the operator, his aircraft, and personnel. This section will also include a brief statement of alleged noncompliance of the Federal Aviation Regulations that were noted during the inspection.

(e) *The analysis summary will report significant findings only* noted during the inspection. This section of the report is to be forwarded to Washington headquarters (FS-300 and FS-400) upon request.

(3) *Section C—Areas of Inspection.* It is through this section of the report that the team notifies the principal inspector and through him the operator, the areas inspected titled area by area and the results of the inspections performed. This section contains the team's findings, discussions, comments, and recommendations as they pertain to the systems inspected.

(a) *Findings.* A finding is a factual determination made as a result of examining a group of data relating to a system and should be a brief factual statement which defines the defects in the operator's PROGRAM or SYSTEM.

1 *Careful consideration must be given* to the use of words that imply an all-inclusive situation such as: "The training programs are inadequate."

2 *Statements such as,* "AJAX Airlines is in noncompliance with FAR 121.0" should not be used as a statement finding.

(b) *Discussion.* Once the problem has been stated and the facts bearing on it generally have been given, further elabora-

tion requires an exposition of the factors to be considered, assumptions made with respect to them, and observations noted in the course of the study. This is the place for analysis, exploration of possibilities and reasoning toward the solution of the problem.

1 *The balance of the discussion* (analysis) should contain all significant factors to support the finding—such as: reference to operator's manual procedures, requirements of FARs, reference to operator personnel interviewed, reference to other SWAP findings, changes in management and supervision, interruption of schedules, MRR, incidents, effect on safety, etc.

2 *This information (data)* should be expressed in a manner to reflect sound deductive reasoning in arriving at the stated finding.

3 *Sufficient examples* will be listed to document discrepancies found during the on-site inspections. They should be listed so as to be easily identified or reviewed by the operator's personnel from their own records. They serve to confirm and support the basic finding and add credence to the conclusions. They should be of such quality to support legal enforcement action if deemed necessary by the principal inspector.

(c) *Conclusion.* Considering the problem, the facts relating to it, and the discussion of the issues and factors pertaining to its causes and its potential solutions, one should be able to formulate conclusions as to the causes of the problem, requirements for its solution, and the actions best suited to the case. The conclusions form the basis for the

development and presentation of alternative courses of action.

(d) *Recommendations.* A page separate from the finding and discussion will be used for recommendations. The consequences of recommendation should be clearly stated.

1 *It should state* any alleged noncompliance found.

(4) *Section D — Substantiating Information.* This section will be used to transmit all pertinent data that was collected by the team to the D.O. for their use in actions with the operator. The documents contained in this section will be identified with the item they support.

203. *DISTRIBUTION OF FINAL SWAP REPORTS WILL BE AS FOLLOWS:*

a. Original will be retained by the SWAP team.
b. One copy without Section D to the Chief, Flight Standards Division/Staff.
c. Two copies (one copy without Section D) to the district office chief.
d. A copy should be available for transmittal to Washington headquarters WHEN REQUESTED by either FS-300 or FS-400.

204. *NONDISCLOSURE TO THE PUBLIC.* The contents of the final SWAP reports constitute findings and recommendations made by the FAA in the enforcement of Federal Aviation Regulations. Accordingly, under the exemption authorized by Section 7.65 of Part 7 of the DOT regulations, copies of SWAP reports or information therein shall not be publicly released or handled indiscriminately. Individual SWAP reports shall be considered as being "For Official Use Only" under the provisions of Order 1600.15C, Information "For Official Use Only" and shall be marked in accordance with paragraph 7 of the Order. (This classification is for the COMPLETE Final SWAP report and does not pro-

hibit transmitting the Findings and Discussion portion of Section C to the operator.)

205. *CONFIRMATION OF OPERATORS' MEETING.* The district office chief or principal inspector will forward a letter to the operator confirming team findings, verbal agreements and deadlines for corrective action developed during the post-inspection meeting.

206. *ALLEGED NONCOMPLIANCE DATA.* One of the objectives of the Systemsworthiness Analysis Program is to emphasize the responsibility of district office staff as the primary agency representatives for their operators. In order to effectively carry out this responsibility, these inspectors utilize the determinations of the SWAP team. In cases where noncompliance is found by the SWAP team, the team report will include sufficient evidence to support the alleged noncompliance. SWAP teams do not process violation reports.

a. *The evidence should be turned over* to the district office for handling.

b. *The information contained in SWAP reports* is the result of systematic SAMPLING. Any noncompliance cited, therefore, does not necessarily comprise the total individual noncompliance that might exist in any given area.

c. *The district office is the official channel for liaison* with the operator regarding violations disclosed by SWAP. It is essential that a practical method for securing necessary copies of documents be established by the district office which is agreeable to the operator and fully understood by all concerned.

(1) The contact points within the operator's organization should be clearly identified.

(2) If a letter of request is required by the operator prior to releasing documents, or copies of same, such correspondence is to be initiated by the district office.

d. *Manuals/Policies/Instructions.* Manual pages, written policy or instruction which resulted in noncompliance only will be IDENTIFIED, except where such material is not readily available to the district office. In these cases, copies will be made.

e. *Observed operations.* Actually observed noncompliance operations are to be supported by appropriate reports, i.e., en route, etc., and/or written statement.

f. *Frequent communications* with district office chiefs or principal inspectors regarding inspections are to be maintained. The SWAP team is to keep the district office inspectors immediately informed regarding major areas of noncompliance or significant defects.

g. *Disposition of alleged noncompliance data.* The district office has the responsibility to determine whether a violation occurred and the course of enforcement action, administrative or legal, that is appropriate in accordance with Handbook 8030.7A.

(1) *SWAP reports are directed* to the analysis of the operator's systems and control of these systems. Examples of defects resulting from system and control problems are cited in support of findings. These examples are frequently items of noncompliance which of themselves may individually warrant enforcement action. (The format and language of a SWAP report is not intended to specifically include the factual statements designed to meet the violation reporting requirements of Handbook 8030.7A.)

(2) *SWAP reports are to identify* sufficient facts and material and include details upon which determinations of noncompliance may be based. When such determinations are made during the course of the on-site inspection, documentation of evidence of non-

compliance noted and contained in SWAP reports will be secured. These will be provided to the principal inspector for use in connection with such enforcement action as may be appropriate. For example:

(a) *Operator's records.* One copy of each sampled record identified in the SWAP report indicating noncompliance. Where a large number of defective records are involved, provide only two or three sample copies. Other records reviewed which contain similar deficiencies are to be identified.

207. *REPORT OF CORRECTIVE ACTION (RIS: FS 8000-7).*

The feedback will identify each finding in the same order as presented in the SWAP report and will clearly but briefly state the corrective action that is satisfactory to the certificate holding office. This will include:

a. *Where corrective action has been taken.*
b. *Where corrective action is not forthcoming.*
c. *Action underway or planned on open items.*
d. *A report of corrective action* will not be considered complete until each finding has been reported as satisfactorily closed in the opinion of the certificate holding office. A status report will be submitted each 30 days on all open items following initial report of corrective action.
e. A follow-up report of corrective action will be submitted, normally, within 60 days following receipt of the final SWAP report, by the certificate holding office.
f. Routing of report of corrective action. Two copies to Chief, Flight Standards Division/Staff.

208.-299. *RESERVED.*

CHAPTER 5. SYSTEMSWORTHINESS ANALYSIS PROGRAM

300. *PURPOSE.* This section provides guidance and procedural instructions applicable to the subsystems within the overall Flight Standards Systemsworthiness Analysis Program.

301. *OBJECTIVE.* The Systemsworthiness Analysis Program applies techniques to assure:

a. *An accurate and penetrating assessment* of all elements of the operator's systems.

b. *Improved effectiveness* of all surveillance functions through analysis of the vital elements of the operator's systems.

c. *The acquisition of factual data* relating to the status of the operator's compliance with applicable Federal Aviation Regulations.

d. *A factual determination* of the potential of the operator's program to consistently conduct safe operations.

302. *SCHEDULED ANALYSIS.* In general, a scheduled systemsworthiness analysis may be limited to one area of an operator's systems. Such scheduling should assure that the time lapse between analysis is not sufficiently long to permit a significant deterioration in the operator's systems. However, several functions of one or more areas may be analyzed at the same time by an optimum team without seriously disrupting the operator's programs or unduly interfering with its personnel or operations.

303. *ANALYSIS PROCESS.* An illustration depicting the analysis processes including the techniques for a penetrating analysis are shown on Figures 1 and 2. These diagrames illustrate the type of follow-through (ascertaining cause and determining effect) included in the analysis processes.

a. *The left-hand side of the illustration* (Figure 2, page 205) is another method of presenting the operator's management groups responsible for

establishing directives, policies and procedures. In applying the Systemsworthiness Analysis Program, the analysis team evaluates and famaliarize themselves with those management segments to be analyzed.

b. *The first level to which management's policies* are applied is the submanagement and supervisory categories at the company headquarters and other facilities. This is accomplished through the use of seven constant components (Figure 1, page 204).

c. *The analysis team verifies the application,* acceptance and comprehension of top management policies at this level. When only partial comprehension, acceptance, or application is found, the CAUSE for deviations will be determined.

d. *In making a determination as to cause and effects* of deviations from significant policies, certain lead words can be used advantageously (who, what, when, where, why, and how). The type of modifiers to be used with these lead words will be dependent upon the information being sought; e.g., HOW was it authorized (in writing or verbal), WHO authorized the change, etc. It is apparent that the use of such words does not lend the question being asked to a "yes" or "no" answer. They tend to draw out the person giving the reply and open up avenues for further questions. These fundamental lead words are highly effective analysis tools, when used in a reasonable manner, by a good listener.

e. *The verification process of the Systemsworthiness Analysis Program* is also used at the employees level. The techniques employed at this level are the same as those used for the submanagement and supervisory levels.

f. *It is apparent, that should the penetration phase of SWAP* be applied to all deviations regardless of their significance, the analysis process would

be cumbersome and time-consuming. Therefore, before the penetrating processes are used on a deviation, their probable impact on compliance with FARs and the effectiveness of the overall system should be analyzed by the team. Should the analyses show deviation that would adversely affect the integrity of the system, etc., employ the penetration processes. If, on the other hand, the analyses indicate the deviation is not significant to the overall program, it should be noted by the team for discussion and disposition by the principal inspector.

304. *PRIMARY ORGANIZATIONAL AREAS.* The four primary areas used by operators to conduct their operation are:

a. *Standards and Procedures.* This basic area includes the operator's system for establishing what he is going to do and how he is going to do it. Where manuals are required by regulation, this is the area which includes responsibility for their publication, accuracy, adequacy, distribution, and revision status. This area also includes:

(1) The operator's system for establishing and disseminating policies and guidelines for management decisions affecting flight safety.
(2) Since this area constitutes management's communication network, close attention should be given to the structure responsibilities, staffing and facilities.
(3) In analyzing this area, it is important to bear in mind that individual discrepancies are usually indicators of system breakdown.
(4) When manuals are found with obsolete pages, inspectors should be concerned with the lack of management control which allowed this condition to exist. Inspectors should be alert to situations where responsibilities and authority in regard to safety are not clearly delineated.

(5) Where procedures for work performance, inspection, testing, etc., are inadequate or erroneous, inspectors should be concerned with the qualification, staffing, supervision, and control of the people and system which produce the procedures.

b. *Quality Assurance.* This basic area includes all functions and activities directed toward assuring that work performed and services rendered are done so in accordance with the operator's policies, procedures, instructions, and in accordance with the applicable Federal Aviation Regulations. This includes the system by which the operator assures that his product conforms to an established standard. "Product" here is used in its broad sense.

(1) A specific organizational segment may be responsible for this function.

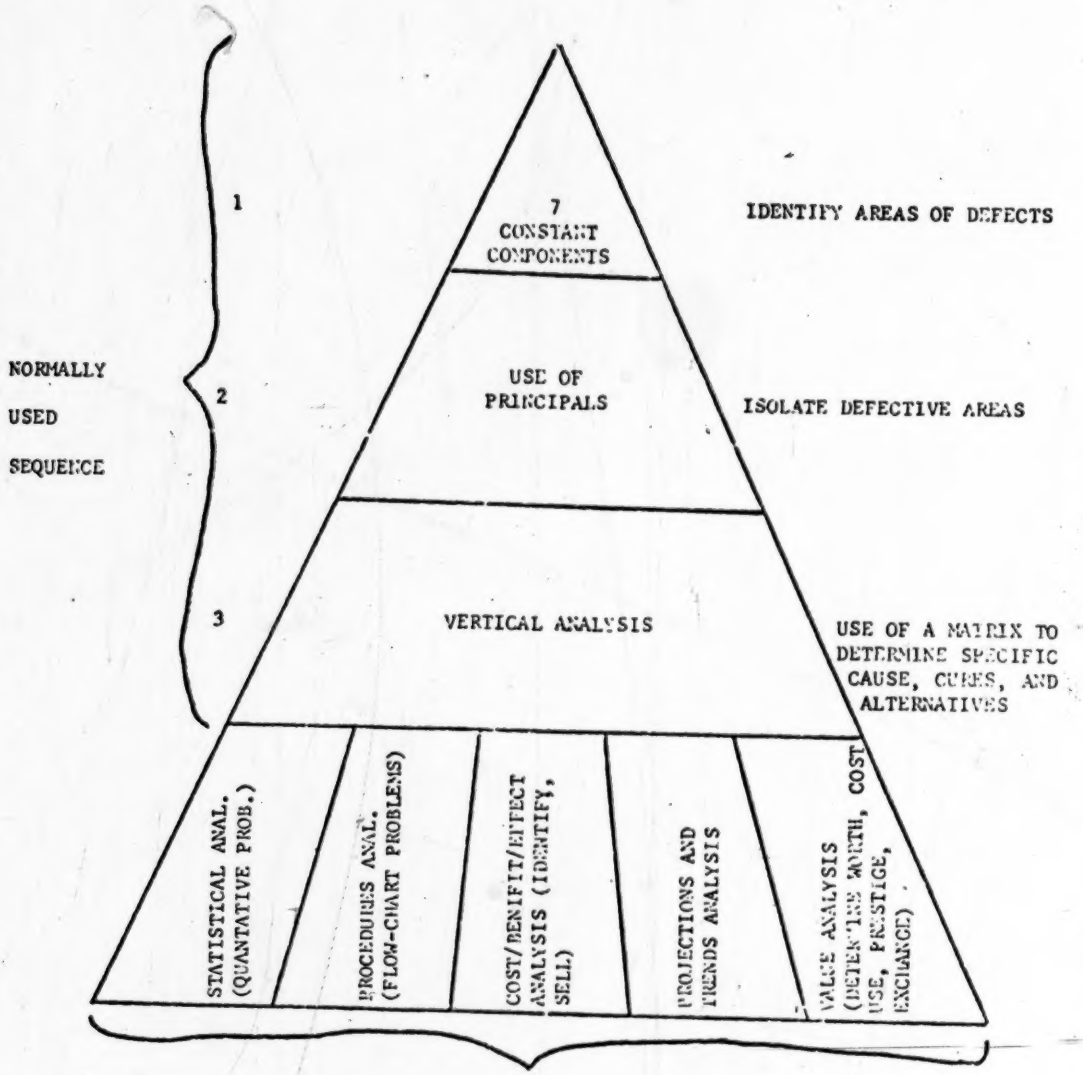
(2) These units may be called an inspection department, quality control department, technical compliance, etc. Regardless of the product and of how formally structured this function is, the basic essentials are the same.

c. *Equipment and Facilities.* This analysis area includes those organizational elements responsible for providing tools, classrooms, materials, shops, supplies, parts, and any other article or commodity, except people, used in the operator's "production" process. This function is also responsible for maintaining the condition and adequacy of these "production tools." Where the previous two areas have been concerned with "what is done, how well it is done," this area assures the ways and means to actually do the job.

d. *Personnel and Training.* This very important analysis area encompasses the total human element. It is concerned with both the quantity and quality of people. It includes availability,

qualification, competency, certificate requirements, direction and training of the operator's personnel. Basically, the concern here is, "Are there enough competent people to do the job?" In many cases, the Federal Aviation Regulations are specific in the requirements for certificated people, training programs, supervision, inspection authorization, etc. In other cases, personnel requirements are implied by requirements for "inspection systems," etc.

FIGURE 1. HOW TO APPROACH SYSTEMS ANALYSIS



305-399 RESERVED

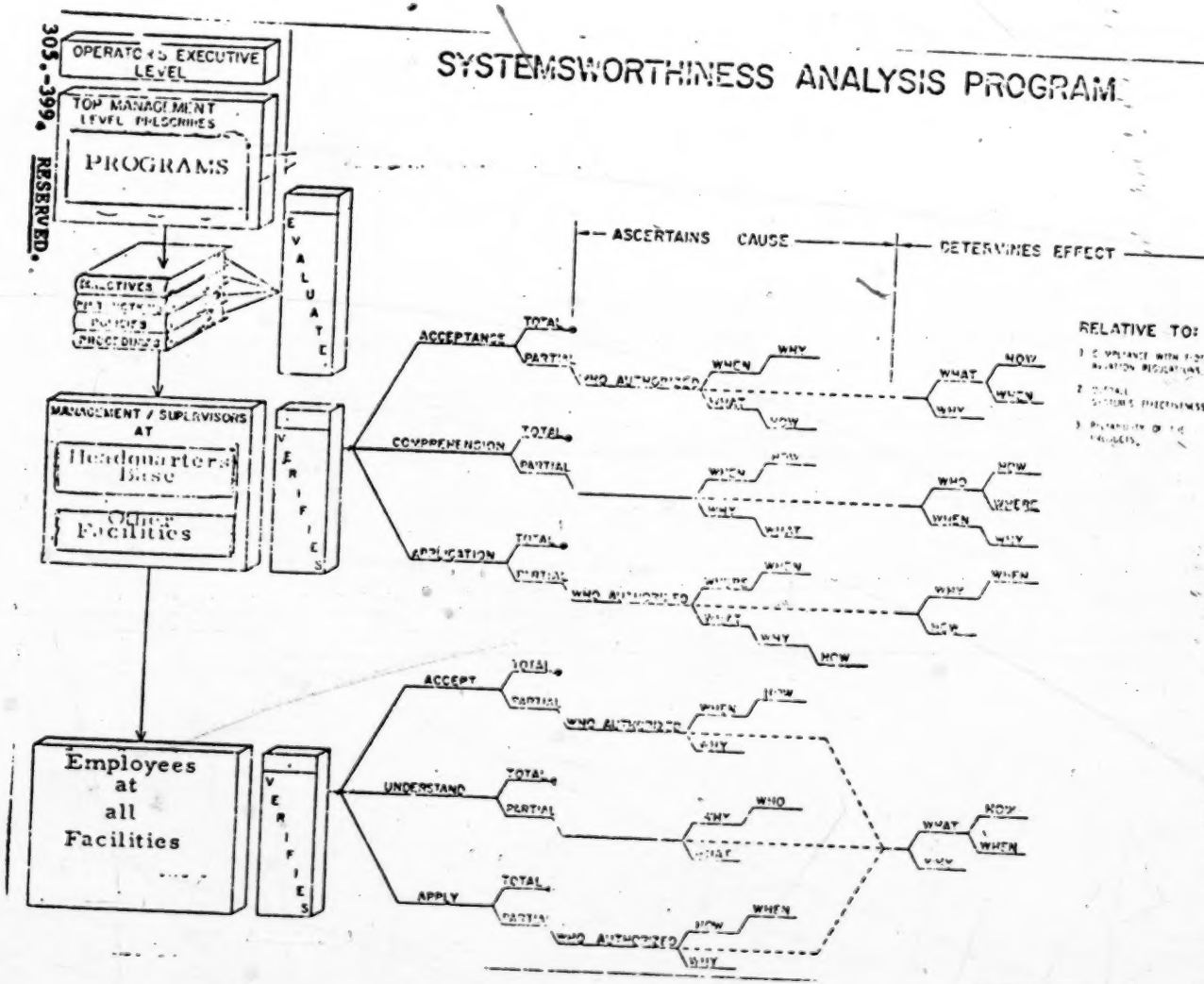


FIGURE 2. SYSTEMSWORTHINESS ANALYSIS PROGRAM

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CHAPTER 6. SYSTEMSWORTHINESS ANALYSIS PROGRAM—MAINTENANCE/AVIONICS

SECTION 1. FAR 121/123/127 OPERATORS AND ASSOCIATED CERTIFICATED FACILITIES

400. *OPERATOR'S ORGANIZATION.* The systems used by operators to maintain aircraft are divided into seven functional areas.

a. *The successful and economical operation* of these complex maintenance areas is dependent upon the thoroughness and effectiveness of directives and followup systems generated by the operator's management group.

b. *These directives and followup systems* normally consist of policies, procedures, and methods applicable to one or more of the listed functions:

(1) *Functions.*

(a) Training.
(b) Quality Control.
(c) Inspection.
(d) Production Control.
(e) Product Improvement/Modification.
(f) Maintenance Performance.
(g) Performance Analysis.

c. *A SWAP team analysis* of an air carrier, travel club or commercial operator should not require a routine SWAP team visit to the certificated facilities with which the carrier contracts unless that facility functions as the physical location of the carrier's main maintenance base. During the analysis, a nonroutine visit to a certificated contract facility may occasionally be required to establish or verify that work is being performed in accordance with the carrier's maintenance program. Such visits should be coordinated with the facility's certificate holding office and should be limited to the specific problem at hand and

not to determine the repair facility's compliance with its own manual or the regulations.

d. *Preparation.* Reviewing the air carrier's Mechanical Interruption Summaries (MIS) and Mechanical Reliability Reports (MRR) files will help the analysis team member to identify problem areas in the carrier's maintenance system. Repetitive occurrence associated with an aircraft, its powerplants, or components (e.g., incompleted trips, frequent delays attributable to maintenance, etc.) are indicators warranting exploration during the actual analysis.

401. *FUNCTIONAL ANALYSIS AIDS.* The information in the following paragraphs describe the seven functional areas:

a. *Training function* is an important and distinct part of the operator's organization:

(1) It provides for the systematic development of personnel knowledge, ability, and competence in maintaining the airworthiness of aircraft.

(2) Product quality can rapidly deteriorate to an unacceptable level through lack of proper training.

(3) The development of new and complex equipment and the rapid changes in methods of maintaining aircraft require that personnel knowledge and skills must advance commensurately.

(4) In many cases, the introduction of new equipment into service has resulted in the selection of the most experienced personnel to maintain the new aircraft. This causes the older aircraft to be maintained by less experienced personnel and can result in a deterioration of product quality.

(5) In addition, many of the older aircraft are being operated by new operators, and as a result, their personnel are unfamiliar with the aircraft and its system. In each of the

above cases, training of personnel is necessary.

(a) *The scope of training* is dependent upon the operator's program requirements. In all cases, individuals who have the duties, responsibilities, and authority for personnel training must be properly qualified and guided by adequate procedures and instructions. Training facilities and aids must be sufficient to meet the needs of the training program. Various types of training are utilized in the development of personnel competency such as:

1 Formal training on new equipment.
2 Recurrent training.
3 Indoctrination of new personnel.
4 Specialized and product manufacturer training.
5 On-the-job and self-instruction.

(b) *Training programs* should contain standards for instructions, schedules, course curriculum, and provision for recordkeeping. Although all of the following points in question form do have universal application, it is suggested that the applicable ones be considered during the analysis of an air carrier training function:

1 Does the air carrier have an apprentice training program? How does it work? Where is it given? How comprehensive is it? Who administers it? What method does the operator use to determine its adequacy?
2 Does the performance of a particular job require initial formal training? Informal training from

one employee to another? Training from supervisor to employee? What training is given? How is it administered? Who gives the required training? How is its adequacy determined?

3 Does the carrier have a formal training department? What area does it cover? Mechanics? Inspectors? Supervisors? Management? Engineers? Where in the organization does the Training Department fit To whom do they answer?

4 Who schedules employees for training? Is the Training Department involved in the scheduling of employees?

5 Who develops the training outlines?

6 Who decides the need for recurrent training?

7 Is training extended to contractors' employees? How does the carrier determine the need for contractors' employees training?

8 Are there adequate training aids for technical training?

9 Are instructors competent and able for training assigned? Who makes competency determination? How is it made?

10 Are there indications of lack of training. Did personnel complain of the lack of training? What specific deficiencies were cited? How did you verify or disprove the allegations?

11 Are training records maintained on each employee? Where are they kept?

(c) *Written procedures and instructions* are an effective supplement to any of the above training methods. They can serve a definite purpose by providing the step-by-step details of completing the work function properly.

b. *Quality Control* is a function by which air carrier management assures that its product conforms to an established standard. While there is generally a specific organizational segment responsible for this function, the elements of quality control are inherent in every functional area of the overall maintenance organization. The quality control organization should be responsible for not only for conformity to technical standards, but also for conformity to company policies and procedures. In some organizations, the actual measurements of the product quality are performed by an inspection department, and the standards or the requirement to inspect are established by the quality control organization. The extent to which the quality control organization assures conformity to company policies and procedures may differ widely among various carriers; therefore, analysis of this area must be carefully and thoroughly conducted. The following questions are designed to assist the analysis team:

(1) Are the instructions and standards for doing a particular job sufficiently detailed to provide the worker with the data he needs? Are they understandable and clear? Do you understand them or do they generate a feeling of need for simplification, clarification, etc.?

(2) Are instructions (manuals) readily available to employees in need of them? Are manufacturers' manuals used? Who maintains them?

(3) Are individual job cards used? Do they contain the job instructions? Are they complete and accurate?

(4) How are job cards accounted for? Is there an established system? Is it satisfactory? Who controls this accounting?

(5) How are nonroutine items handled?

(6) Is adequate housing provided to permit continuous maintenance in inclement weather? If the housing is procured by contractural or other arrangements, is it satisfactory for the type of work to be done? Is it usable? Is it in the right location?

(7) Are sufficient workstands available to examine portions of aircraft beyond normal ladder reach? Are they properly located over the carrier's route structure?

(8) Are the special tools required for the job available? Are they in usable condition? Engine overhaul? Instrument? Electrical/Electronics? Airframe repair? Accessory overhaul?

(9) Is special balancing and testing equipment available? X-ray? Magnaflux? Other?

(10) Does carrier do plating? Are the standards used for this work satisfactory? Is the work contracted? Does the contractor's equipment meet the standards set for the specific work he performs? What system does the carrier have to ascertain the contractor has adequate instructions, tools, equipment, personnel, etc., to perform a particular job?

(11) Are individual mechanics required to have minimum tools? Are they adequate?

(12) How does carrier control the quality of fuel and oil purchases? Do they meet manufacturers' specifications?

(13) Who controls the purchasing of parts and supplies? To whom do they answer?

c. *Inspection.* Inspection is the function which, through processes of examination, measurement, and test, confirms that the product conforms to established standards. The inspection department is usually a distinct segment of the carriers' overall maintenance organization. It should be

unencumbered with countermanding authority from other segments or functions. Competent and adequate staffing is essential and proper tooling, equipment, facilities, and instructions are required. Close alliance or actual integration with the quality control organization is a common situation. Special attention in the analysis of the inspection function should be given to ascertain the organizational level at which it is separated from the various production functions. Typical questions for the analysis of this area are:

(1) What system has been devised by the air carrier that integrates the findings of the inspection department into the aircraft's work program?
(2) Is the inspection organization separated from the production organization? At what level does inspection and production come under a common head?
(3) What is organization setup for lower echelons? How many inspectors work for a single supervisor?
(4) How are inspectors selected?
(5) What type of maintenance checks require the services of the Inspection Department? Where are these maintenance checks conducted?
(6) Do inspectors accomplish receiving inspection? 100 percent? How are new or reworked parts selected for inspection?
(7) Is there inspection representation at contractor's facilities?
(8) What type jobs are "double inspected"?
(9) What checks or maintenance operations are inspectors using as "work finders"?
(10) What maintenance operations are "bought back" by inspectors?
(11) What system is employed that assures a completed airplane is released to flight op-

erations after an overhaul or heavy check has been performed? Has the system proved workable, practical, and foolproof?

(12) Do such functions as engine overhaul, instrument, radio overhaul, etc., have inspections specializing in these areas assigned? How are they selected?

(13) What inspection responsibilities have been delegated to production personnel? How is it controlled?

(14) How is the maintenance release accomplished after overhaul? After heavy check? After a complicated component change or repair?

(15) Are personnel releasing to service propellers and instruments out of overhaul properly certificated and rated (Repairman Certificate)?

d. *Production Control.* Production control is a management function responsible for scheduling maintenance operations including the necessary controls to assure that work is scheduled in accordance with time limitations contained in the operations specifications and the operator's manual. It is utilized to assure that maintenance functions are scheduled in logical sequence at the proper time and at a place where competent personnel, proper parts, equipment, tools, and instructions are available to accomplish the work required by the maintenance program. Production control serves as a regulator for the maintenance cycle. It provides safeguards to prevent:

(1) Exceeding approved time limitations.

(2) Backlog accumulation of work resulting in loss of scheduled aircraft service.

(3) Errors in workmanship through unplanned and hastily performed work.

(4) Shortages in available manpower.

(5) Failures to perform the work required by the Federal Aviation Regulations.

(a) Many maintenance functions are performed on a nonroutine basis. In this respect, the system for production control must be sufficiently flexible to compensate for variations in workloads and provide the necessary schedule and control to assure that the work is accomplished. Production control is also the means of coordinating the efforts of the engineering, supply, maintenance, and inspection organizations. In accomplishing its functions, production control should know:

1 The location of the aircraft on the route scheduled flight time.
2 Accumulated flight time each day.
3 Total time and time since last overhaul time-controlled parts.
4 Types of maintenance operations to be performed and the time interval for performing each operation.
5 Manhours necessary to perform the operation.
6 Manpower availability at a given time and place.
7 Parts requiring replacement in each maintenance operation.
8 Availability of parts, tools, and equipment.
9 Availability of spare equipment.
10 Output capability of all shops in the repair facilities.

(b) The following questions are developed to assist in making an analysis of the production control functions.

1 Is there a separate organizational unit responsible for the scheduling of aircraft maintenance functions? Does it

include the shop scheduling of parts, components, etc.? Are all shops considered in this scheduling?

2 To whom does the scheduling organization answer?

3 Are there any indications of the lack of necessary ground time to accomplish required maintenance?

4 Is there an abnormal number of carry-over items due to lack of time or parts?

5 Who schedules ADs and engineering changes?

e. *Product Modification.* Product modification is the function responsible for making alterations to a product so that it will more adequately satisfy its designed purpose. It is an integral part of the operator's total maintenance program, and is especially important in cases where deterioration of product reliability may affect the airworthiness of the aircraft.

(1) *Product modification functions* are generally organized into an engineering department or a combination quality control and engineering department. Regardless of how the functions are organized, the department must be capable of properly controlling product modification. It must have competent personnel who are assigned the duties, responsibilities, and authority to make design changes and prepare necessary data and drawings including procedures and instructions necessary to accomplish the modification. Determination of the need for product modification usually originates in another area of the maintenance organization.

(2) *Typical activities* which occur after the need for product modification is determined are:

(a) Evaluation and planning.
(b) Preparation of necessary data, drawings, and engineering change orders.
(c) Coordination with the product manufacturer as necessary.
(d) Parts, tools, and material specification.
(e) Preparation of procedures and instructions relative to accomplishing the modification.
(f) Followup after the product is returned to service.

(3) *Many segments of the maintenance organization* must be closely coordinated in order to properly accomplish product modification. For example:

(a) A service bulletin is issued by the product manufacturer concerning a service difficulty.
(b) The analysis department furnishes the product modification function (engineering department) with appropriate data concerning service experience with the product.
(c) The service bulletin is evaluated and the decision is made to incorporate it into the aircraft fleet.
(d) The engineering department prepares necessary data including procedures and instructions.
(e) Purchasing and parts procurement department obtains the necessary parts, materials, and tools.
(f) The analysis department provides surveillance of the fleet and furnishes the product modification function with any other pertinent data.
(g) The training department may become involved if the work techniques are specialized.

(h) The production control department revises the maintenance schedules to provide sufficient time and manpower to accomplish the work.

(i) The maintenance department accomplishes the work and the inspection department performs a conformity inspection.

(j) The analysis department monitors the reliability of the product and confirms correction of the service difficulty.

This combined action completes the cycle and should provide an improved product.

(4) *The analysis of this phase of the carrier's total maintenance program* considers the adequacy of the product modification organization, its authority and control, and the existence of guidelines and procedures for its proper functioning. Also considered are such factors as the competency of its personnel and their comprehension of and adherence to the carrier's policies, standards, and procedures. The following type questions will serve as probes for analyzing the modification area:

(a) How is the need for modification changes determined?

(b) To what extent is the manufacturer's engineering service used?

(c) What manufacturers' drawings, test reports, and system analyses are readily available?

(d) What system of feedback is used to advise the engineering group of any problems encountered with the implementation of the modification by the maintenance sections?

(e) Is there a check for airworthiness of all modifications by a qualified person other than the designer? If so, who

makes the check and what are his qualifications?

(f) How is the determination made as to which modifications require FAA approval? Who determines what changes require FAA approval? How are the changes requiring FAA approval handled?

(g) How are weight changes recorded?

(h) How are Engineering Orders given to shops for action? Are they easily identified as EOs? Are they so written as to be easily understood by maintenance personnel?

(i) What actions must be taken before releasing a modification for work by the maintenance department.

j. *Maintenance Performance.* Maintenance performance is the function generally referred to as "maintenance" and includes responsibility for actual work processes of overhaul, repair, alteration, adjustment, and checks of the aircraft and its systems and components.

(1) The maintenance performance organization must possess capability through adequate facilities, competent personnel, practical instructions and procedures, attainable standards, and effective controls regardless of variations in size and complexity. Careful evaluation of these factors is essential to a successful analysis of the maintenance function. The following questions are directed toward making such a determination:

(a) What is the line of authority and responsibility of mechanics? What is relationship of maintenance organization to purchasing, training, inspection, engineering, and production control? Where in the organization do these segments answer to a common head?

(b) Under what condition can "maintenance" deviate from published standards?

(c) What level of supervision can fire and hire? Issue reprimands for record?

(d) What is general level of mechanic intelligence as indicated by his educational background, formal schooling, trade schools, etc.? What is mechanic expected skill level as indicated by his experience with the company and with industry? Are mechanics assigned work on a specialist's concept? How many mechanics are certificated?

(e) Are adequate tools, manuals, and facilities available?

(f) Are contract mechanics used at line stations?

(g) What is source of newly hired mechanics? Do mechanics move about system?

(h) Is there a system established by which a deficiency found by mechanics can be made known to personnel with authority for having it corrected?

k. *Performance Analysis* is a function of the overall maintenance system which evaluates product performance and identifies problem areas.

(1) *It detects deficiencies*, signals the need for corrective action, and monitors the effect of the action. It provides inputs to the engineering department to effect modification, to quality control to provide standards, to inspection to revise techniques, to production control to provide rescheduling, etc., inherent in this activity, is data collection and technical investigation.

(2) *Analysis of the procedures and control* exercised by this organization and the effectiveness of their coordination with other or-

ganizational elements should be carefully considered. Following are typical questions for analysis in this area:

(a) What is the source of basic information on service difficulties? Is there more than one source? What are they? Are any useful sources being overlooked or omitted?

(b) Are there adequate instructions for completion of reports on service difficulties? Are they understandable? Are they usable? Are they followed?

(c) Is there a system for reporting difficulties encountered during operation of aircraft? During overhaul? During routine inspection?

(d) Is responsibility for reporting difficulties spelled out in sufficient detail to be meaningful?

(e) Who is this information directed to? Do they get it all?

(f) Does each department receive and analyze its own difficulties? How are upper echelons advised of how the operation is going.

(g) Are personnel analyzing difficulties capable and trained to perform this function?

(h) What is required to initiate corrective action once a problem has been identified? Is the responsibility for implementing this requirement spelled out?

(i) What use is made of industry's problems in analyzing the difficulties being experienced by the air carrier?

(j) Are fixes established based on problems being encountered by industry before they occur on the carrier being analyzed? Are MRR reports used for this purpose?

(k) Are boards of inquiry established for major problem areas such as engine failures, structural failures, etc.? Who makes up this Board?

402.-429. *RESERVED.*

SECTION 2. APPLICATION OF MAINTENANCE/AVIONIC SYSTEMSWORTHINESS ANALYSIS—GENERAL AVIATION

430. *PURPOSE.* This section provides guidance and procedural instructions for the application of the Systemsworthiness Analysis Program.

a. *Systemsworthiness Analysis Team—Preparation and Planning.* The team should first review and become familiar with the operator's policies and procedures as they pertain to the area to be analyzed, and as set forth in his manuals. The objective of this review is to determine whether or not company policies and procedures are consistent with the provisions of the Federal Aviation Regulations, operating certificate, and operations specifications.

(1) A successful systemsworthiness analysis requires careful fact-finding and objective analysis.

(2) When a deficiency or questionable area is detected, a thorough search must be made to trace it back through the system to the causal point of origin.

(3) The inspector must concentrate on the area under analysis and pursue it to a positive completion so that a factual determination can be made.

(4) Deficiencies existing in any organization may result from a variety of causes. The inspector should be particularly alert to indications of inadequate communications or followup procedures and a lack of effective delegation of authority.

b. *Analysis of Supervision.* It is one thing to delegate authority and another to see that responsibilities are carried out effectively in accordance with established policies and procedures. Check for the adequacy and understandability of instructions and directives, and the training and competency of personnel. In this respect:

(1) Do employees understand and effectively carry out policies and procedures?
(2) Determine whether proper delegations of authority are made down through the organization.
(3) The inspector must evaluate the adequacy of control exercised by management by determining how management follows up to ascertain policy and procedural compliance.

c. *Analysis and Procedures.* Determine whether or not procedures are set forth clearly and are practicable of accomplishment. When analysis of a problem area discloses that existing instructions are inadequate or the system used when implementing instructions lacks proper definition, detail, or sensibility, then procedures should be the prime area of concern.

d. *Analysis of Company Procedures.* It is important that the inspection team determine whether the operator's policy is set forth in a manner which will assure compliance with acceptable safety standards. Assuming that company procedures as set forth in the operator's manuals and directives is satisfactory:

(1) Determine whether company procedures are in fact carried out in actual practice. Misinterpretation of company policies by personnel at middle management or working level may be reflected through incomplete records or procedural shortcuts.
(2) Corrective action may require additional training, recasting of company policy or

revision of company procedures to conform to company policy.

e. *Analysis of Management Control.* This is one of the most important aspects of the Systemsworthiness Analysis. A good axiom is "competent management usually results in a safe operation." The person ultimately responsible for conducting a safe operation is the president of the company. In a large company, the president must delegate authority down through the organization. It is important, therefore, that the systemsworthiness analysis team be knowledgeable of the duties and responsibilities of key company officials. The team should consider:

(1) *Management competency.* This is usually reflected in the operator's compliance and/or safety record. Are the supervisors abiding by the policies and rules set forth in the company manuals and directives?

(2) *Communication.* An indication of a communication breakdown through the organization may also reveal that management is not monitoring performance at the working level.

431. *AIR TAXI OPERATORS AND COMMERCIAL OPERATORS OF SMALL AIRCRAFT (FAR 135).*

a. *Performance Factors.* In planning and conducting the inspection, the following factors which influence the performance of air taxi and commercial operations either directly or indirectly, should be considered.

(1) Type/area and frequency of operations. (scheduled, etc.)
(2) Class and category of aircraft (complexity).
(3) Stability of the operators' fleet.
(4) Service history of the aircraft.
(5) Aircraft manufacturer's recommendations.
(6) Size of organization and employee morale.

(7) Service experience of the operator.
(8) Operator's maintenance management policies.
(9) Maintenance facilities utilized (owned or contracted).
(10) Aircraft inspection program utilized. (100-hour/annual, progressive, or approved inspection program).
(11) Fueling facilities utilized (owned or contracted).

NOTE: The importance of each item is not necessarily in the order shown above, since they bear different degrees of importance with each operator. The above lists should not be considered to be all-inclusive and is intended only as a guide which may lead to other factors affecting an operator's performance, that should also be considered.

b. *Determining the Importance of Performance Factors.* Operators' reports and records offer some keys to the importance of the above performance factors as they affect his operation. When planning the inspection, the following reports and records should be obtained from the certificate holding district office, in accordance with regional procedures, and should be thoroughly examined:

(1) *Operations Specifications should show*:

(a) Whether an approved aircraft inspection program is required.
(b) Whether deviations to any rule is authorized.
(c) The specific items required to meet a particular situation.
(d) The category and class of aircraft authorized for use.
(e) Registration numbers of aircraft subject to an approved inspection program.

(2) *Certificate Holders Manuals should show*:

(a) The identity of each person in a management capacity who is authorized to act for the certificate holder in his assigned area of responsibility.

(b) The procedures established by the certificate holder for the use and guidance of flight, ground operations and maintenance personnel.

(3) *Load Manifests should show*: (For multiengine aircraft requiring two pilots.)

(a) Passenger and cargo load factors.

(b) Currency and accuracy of empty weight and center of gravity values being utilized, when compared with current aircraft weight and balance data, and equipment list.

(4) *MRR/MIS reports should show*:

(a) Significant trends in the mechanical reliability of the operator's aircraft.

(b) Indications of breakdown in the operator's maintenance management policies.

(5) *Prior FAA inspection reports should provide* a history of deficient areas, if any.

(6) *Follow-up reports and enforcement actions* will often provide keys to weak areas in the operators management system and reflect their overall attitude toward Federal Aviation Regulations.

c. *Primary Areas.* The following inspection areas should be given added emphasis, since the history of air taxi operations has shown that these areas have generated, and continue to generate the most significant problems.

(1) *Policies and Procedures.*

(a) Certificate Holder's Manual.

1 An effective certificate holder's manual should contain a statement which places the responsibility on a particular individual for its content, accuracy, currency, and distribution.

2 The procedures contained in the manual should not merely restate or paraphrase a regulation or a company policy; rather they should identify who, what, why, when, where and how the various functions are to be carried out. Each procedure should contain sufficient information for a new employee to effectively perform a given function without further guidance.

3 During an evaluation of the operator's maintenance procedures, consideration should be given to the following areas:

(a) Does the operator allow sufficient time for scheduled maintenance?

(b) Is maintenance performed according to acceptable standards or specifications?

(c) Does the operator periodically check the adequacy of contract facilities?

(d) Do records indicate the contractor is performing in accordance with the contract?

(e) Are the duties and responsibilities of maintenance and inspection personnel clearly understood?

(f) Do maintenance personnel utilize FAA form 8330-2 M or D Report?

(g) Does the operator have a procedure for recording and correcting pilot reports of aircraft discrepancies?

(h) Does the operator have an established procedure to assure compliance with and recording of airworthiness directives?

(i) Does the operator have a procedure for correcting aircraft weight and balance data affected by repairs, alterations or equipment changes?

(2) *Quality Control System.* The certificate holder should utilize some form of quality control system to determine the effectiveness of his organization. For a small air taxi operation, this may be the review of a form completed by a pilot, mechanic, or fueling personnel, which feeds back sufficient information to management to assure that operating personnel understand and follow company policies and procedures. This is the system which closes the loop that began with the establishment of company policy. The result of an effective quality control system may be a change in policy or procedure, or a confirmation that the policy or procedure in current use will produce the optimum result.

(3) *Facilities and Equipment.* The maintenance agency utilized by the certificate holder, whether owned or contracted, shall have adequate facilities and equipment for maintaining the particular aircraft operated by the certificated holder. The team should determine:

(a) Whether storage space for spare parts, etc., is adequate and provides protection from damage and contamination. These conditions should apply to contract facilities as well.

(b) Those repair stations that are subject to other SWAP inspections will not be inspected in depth as a function of ATCO inspection.

(c) The fueling facilities utilized by the certificate holder, whether owned or contracted, should be capable of deliv-

ering uncontaminated fuel of the proper grade, type and quantity, while providing for passenger protection.

(d) That the fuel-dispensing equipment had adequate static ground protection, identification (grade of fuel), filters, and fire extinguishers.

(4) *Personnel.*

(a) All personnel used by the certificate holder should have the technical ability and experience necessary to perform their assigned duties.

(b) All persons directly in charge of maintenance shall be appropriately certificated.

432. *AIR TAXI OPERATORS OF LARGE AIRCRAFT.*

The instructions and guidance material contained in Section 1 of this chapter will apply to Air Taxi/Commercial Operators of large aircraft certificated under the provisions of FAR 135.2.

433. *REPAIR STATIONS FAR 145.*

a. *Performance Factors.* In planning and conducting the inspection, the following factors which influence the performance of repair stations, should be considered:

(1) The certificate and ratings.
(2) The class and category of aircraft, powerplant and/or appliances (complexity).
(3) The Repair Stations Inspection Procedures Manual.
(4) Multiple ratings.
(5) Manufacturers' recommendations.
(6) Major source of workload (air taxi, air carrier, travel club, etc.).
(7) Employee morale.
(8) Employee experience.
(9) Operator's experience.

(10) Facilities.
(11) Equipment.
(12) Operators' maintenance management policy.

NOTE: The importance of each item is not necessarily in the order shown above, since they bear different degrees of importance with each operator and the type of service being offered. The above list should NOT be considered all inclusive, and is offered only as a guide, which may lead to other factors affecting the operator's performance, and that should be considered.

b. *Determining the Importance of Performance Factors.* Operators' reports and records offer some keys to the importance of the above performance factors as they affect the operation. When planning the inspection, the following reports and records should be obtained from or examined at the certificate holding district office.

(1) *The repair station certificate* (Operations Specifications) will show:

(a) Ratings held, limited and/or class, e.g., airframe, powerplant, instrument, radio, etc.
(b) Limitations, if any.
(c) List of make, model, series or other identification.

(2) *The district office* repair station correspondence file will provide a history of problem areas, if any.
(3) *Corrective action reports,* administrative and legal, will also indicate past problem areas.
(4) *"Followup Reports"* of corrective actions will provide a key to the operator's attitude toward Federal Aviation Regulations.

c. *Certificate holder's personnel roster* should identify persons in management capacity who are authorized to act for the repair station in assigned areas of responsibility.

d. *Primary Areas.* The following areas should be given particular emphasis:

(1) *Policies and Procedures.*

(a) Each repair station shall maintain a current roster of its management and technical supervisory personnel and its inspection personnel. The roster will provide the following:

1 The person's name and title of his position.

2 Years of experience in the work he is doing.

3 Resume of past experience.

4 The scope of his present employment responsibility.

5 The type and number of his mechanic's or repairman's certificate and the ratings on that certificate.

(b) Repair stations may not use persons directly in charge of maintenance or alteration, unless he is included on the personnel roster.

(c) The team should determine whether the repair station is maintaining a current roster of personnel and that personnel are performing within the scope of their authority.

(2) *Quality Control System.* The repair station inspection procedures manual should provide a clear explanation of the internal inspection system.

(a) *The manual must state in detail:*

1 The methods, techniques, and equipment to be used to determine quality

or airworthiness of articles being maintained by the repair station.

2 The methods of inspecting incoming materials for state of preservation, malfunction or defects, before being placed in stock or used on aircraft.

3 The system of preliminary inspection to determine the state of preservation or defects of articles to be maintained and the recording of inspection findings.

4 The system of inspection for hidden damage in any airframe, powerplant or part thereof that has been involved in an accident.

(b) *The inspection procedures manual* should describe the continuity of inspection responsibility and include samples of inspection forms with instructions for executing them.

(c) *The inspection procedures manual* should reference the manufacturer's inspection standards when appropriate.

(d) *A copy of the inspection procedures manual* shall be available to supervisory, inspection, and other personnel. Each procedure should contain sufficient information for employees to effectively perform given functions without further guidance.

(e) *The team* will not only determine that the inspection procedures described in the repair station manual are adequate, they will also determine whether or not these policies and procedures are being adhered to by each echelon of the organization.

(3) *Facilities and Equipment.*

(a) *Repair stations* should have adequate facilities and equipment for maintain-

ing the products for which it is certificated.

1 Housing.

(a) Heat, ventilation, dust, humidity, and lighting control.
(b) Storage space and protection for tools, parts, and supplies.
(c) Cleaning, sandblast, battery service, spray painting, and plating isolated from production areas.

2 Equipment.

(a) Current data appropriate to rating held, including manufacturers' manuals and service information, airworthiness directives, etc.
(b) Appropriate inspection work forms.
(c) Special tools, test equipment, jacks, etc.
(d) Calibration and testing of all inspection and test equipment at regular intervals to assure correct calibration.

(4) *Personnel.*

(a) Technical personnel should have the ability, knowledge, and experience necessary to perform their assigned duties in an efficient manner.
(b) All persons directly in charge of maintenance or inspection must be appropriately certificated.
(c) All personnel should be thoroughly familiar with established company inspection procedures.
(d) During performance of maintenance functions, technical employees should have available and use the appropriate current technical data.
(e) Factory school and/or on-the-job training should be provided.

NOTE: Inspection teams should determine that repair stations performing maintenance for operators certificated under the rules of FARs 121, 123, and 127 have the operator's manual available to the technical personnel, and that work is performed according to that manual.

434. *MAINTENANCE TECHNICIAN SCHOOLS FAR 147.*

a. *Performance Factors.* In planning and conducting the inspection, the following factors which influence the performance of a maintenance technician school and its graduating students should be considered:

(1) The curriculum.
(2) Equipment and facilities (classrooms and shops).
(3) Instructor qualifications.
(4) Student instructure ratio.
(5) Instructional aids.
(6) Records.

b. *Curriculum.* In accordance with rating held:

(1) Is approved curriculum being followed?
(2) Does instruction program follow natural sequence?
(3) Have any changes been made to curriculum?
(4) Are shop phases correlated with theory classes?
(5) How and when are examinations given?
(6) Are examinations suitable and adequate?
(7) Does curriculum need changes?
(8) Do instructors have access to curriculum?

c. *Equipment and Facilities.*

(1) Does equipment and facilities meet FAR requirements?
(2) Are they maintained properly?
(3) Are safeguards being used for hazardous equipment?

(4) Is technical data available for use in shop?
(5) Are classrooms suitable for teaching?
(6) Are facilities and equipment proper for the number of students in classes?
(7) Do they have a tool and parts room?
(8) Where are records and tests stored?
(9) Are heating, lighting, and venting adequate?
(10) Do they have material, parts, tools, and shop equipment for student shop projects?

d. *Instructors and Personnel.*

(1) Do they meet FAR 147 requirements?
(2) Do they have industry experience?
(3) Does he have professional teacher training?
(4) What are the duties and responsibilities of each instructor?
(5) Do instructors have a training program?
(6) What is each instructor's teaching *load?*
(7) How do instructors follow the curriculum?
(8) What are the classroom abilities of each instructor?
(9) Does he use a daily lesson plan?
(10) How does "he" evaluate his instruction?
(11) Is he prepared when starting class? Was it adequate?
(12) Are uncertificated instructors used to teach aircraft subjects?
(13) Are any instructors also mechanic examiners?
(14) Observe mechanic practical if possible.

e. *Students.*

(1) Do they understand the curricula?
(2) Have they received the units of study reflected in school records?
(3) Is the training received effective?
(4) Are they interested and motivated by instructors?
(5) Are professional ethics and standards indoctrinated in them?

(6) Are tools, materials and equipment available to students during training?
(7) Does the student know the school's system for grading and evaluating?
(8) Is number of students enrolled below the schools approved enrollment authorization?
(9) How do students generally feel about course and instruction?

f. *Shop projects.*

(1) Do shop projects fit properly with curriculum?
(2) Is adequate information available to student on the project?
(3) Are projects of the correct complexity?
(4) Do projects significantly represent aircraft related jobs and curriculum complexity level?
(5) Does evaluation of project by student reflect the use of proper tools, test equipment and data?
(6) Are projects in skill areas and levels of those required by curriculum?
(7) Is flexibility offered to student who can go beyond the required?
(8) Are proper tools available and used by students?
(9) Do instructors assure projects meet AC 43.13-1 standards before acceptance for grading?
(10) How are project grading standards arrived at?
(11) Are students instructed to seek out and use appropriate data relating to assigned projects?

g. *Instructional Aids.*

(1) Are they realistic and practical for the intended purpose?
(2) Are they used at the proper time and available when needed?

(3) Do they have technical data available?
(4) Is technical information (FAR, Aircraft Spec., Advisory Circular) available?
(5) Does the school have aviation library open to students?
(6) Do they meet FAR 147.17 requirements?
(7) Are they adequately maintained, displayed, etc.?
(8) Do they have provisions for updating to modern instructional aids?

h. *Records—Students.*

(1) Are records understandable and meaningful and indicate the current situation?
(2) Are the required records maintained (FAR 147)?
(3) Are remedial and make-up assignments and examinations current?
(4) Are they complete?
(5) What type of security measures are taken with records?

435. *PILOT TRAINING SCHOOLS (FAR 141).*

a. *Performance Factors.* In planning and conducting the inspection, the following factors concerning aircraft maintenance which influences the performance of pilot training schools either directly or indirectly should be considered:

(1) Types of certificate and rating issued to the operator.
(2) Types of aircraft operated by make and model.
(3) Aircraft owned by the operator.
(4) Aircraft operated under lease agreement with maintenance arrangement.
(5) Who is responsible for the aircraft maintenance, and is he properly certificated?
(6) Aircraft maintained at operator's facility.
(7) Aircraft maintenance is contracted to a repair station or other facility by approved arrangement.

(8) Certificated maintenance personnel employed by the operators; other arrangements.

(9) Type of aircraft inspection program used, 100-hour/annual or progressive.

(10) Fueling facilities utilized (owned or contracted).

(11) The history of problem areas involving aircraft maintenance, if any, as indicated by related correspondence and inspection or enforcement reports.

(a) *The district office files will show:*

(1) Whether the school operates its own maintenance facility.

(2) Whether the school employs certificated maintenance personnel.

(3) When contract maintenance facilities are utilized, the team should also review the appropriate district office files.

(b) *Aircraft listings will show:*

(1) The number of aircraft operated by the school.

(2) The various types of aircraft, make/model.

(3) The aircraft owner (leased—maintenance agreement).

(4) The operation for which each aircraft is equipped.

(c) *Prior inspection reports will provide* a history of deficient areas, if any.

(d) *Followup reports and enforcement action reports* often provide keys to weak areas in the operator's management system and reflect their overall attitude toward Federal Aviation Regulations.

b. *Primary Areas.* The following areas should be given particular emphasis:

(1) *Policies and Procedures.*

(a) Each operator should have a policies and procedures manual which contains a statement which places the responsibility for its content, accuracy, currency and distribution on a particular individual.

(b) The procedures contained in the manual should identify who, what, why, when, where, and how various functions are to be carried out. When properly written, each procedure contains sufficient information for a new employee to effectively perform a given function, without further guidance.

(2) *Quality Control.* During an evaluation of the operator's maintenance procedures, consideration should be given to the following areas:

(a) Does the operator allow sufficient time for scheduled maintenance?

(b) Does the procedure for scheduling inspections prevent time overrun?

(c) Is maintenance performed according to acceptable standards or specifications?

(d) When applicable, does the operator periodically check the adequacy of contract maintenance facilities?

(e) Do records indicate that inspections and maintenance are being performed properly?

(f) Are the duties and responsibilities of maintenance inspection and service personnel clearly understood?

(g) Do maintenance personnel utilize FAA Form 8330-2?

(h) Is all maintenance performed properly recorded in aircraft and powerplant records?

(i) Does the operator have any established procedure to assure compliance with and recording of the airworthiness directives?

(j) Does the operator have a procedure for recording and correcting pilot reports of aircraft discrepancies?

(3) *Facilities and Equipment.* During evaluation of the pilot school maintenance facilities (owner operated or contracted), the following should be determined:

(a) That tools and equipment are available for adequate maintenance of the operator's aircraft.

(b) That parts and supply storage facilities provide adequate protection and identification for serviceable parts.

(c) That ramp equipment such as tie-downs, wheel-chocks, control blocks, and fire extinguishers are available and in good repair.

(d) That fueling equipment is properly identified, maintained in good repair, and equipped with adequate grounding devices.

(e) That emergency equipment such as life vests, rafts, signal devices is maintained in proper repair.

NOTE: Repair stations that are subject to other SWAP inspections will not be inspected as a function of pilot school inspections.

(4) *Personnel.* Maintenance personnel used by the certificate holder should have the technical ability and experience necessary to perform their assigned duties in an efficient manner:

(a) All persons directly in charge of maintenance shall be appropriately certificated.

(b) When the operator provides factory and or on-the-job training, the efficiency of maintenance personnel is greatly increased.

436.-499. *RESERVED.*

CHAPTER 7. SYSTEMSWORTHINESS ANALYSIS PROGRAM—OPERATIONS

SECTION 1. GENERAL PROCEDURES

500. *PURPOSE.* This section provides guidance and procedural instructions applicable to the Operations Systemsworthiness Analysis Program.

501. *PREPARATION AND PLANNING.* The Systemsworthiness Analysis Team should review and become familiar with the operator's policies and procedures as they pertain to the area to be analyzed and as set forth in his manuals. The objective of this review is to determine whether or not company policies and procedures are consistent with the provisions of the Federal Aviation Regulations, operating certificates, and operations specifications.

502. *OPERATOR'S ORGANIZATION, POLICIES AND PROCEDURES.* The authorities, responsibilities, tasks, and relationship of each position in the organization should be clearly and completely described in writing.

a. *Management Control.* This is one of the most important aspects of the systemsworthiness analysis. A good axiom is "competent management usually results in a safe operation." The person ultimately responsible for conducting a safe operation is the president of the company. Obviously, in a company the president must delegate authority down through the chain of command. It is important, therefore, that the prin-

cipal inspector, during his briefing of the Systemsworthiness Analysis Team, outline the duties and responsibilities of key company officials. Deficiencies in this area might be caused by:

(1) *Management Irregularities.* This deficiency is usually reflected in the operator's compliance and/or safety record and immediate corrective action is in order.

(2) *Misinterpretation* of company policies by personnel at middle management or working level. Corrective action here might require additional training, recasting of company policy, or revision of company procedures to conform to company policy. The immediacy of the corrective action would depend upon the degree of severity.

(3) *Lack of communication* down through the chain of command. This might also indicate that management is not monitoring performance at the lower management levels and initiating timely corrective action. Again, the immediacy of corrective action would depend upon the circumstances.

b. *The analysis team* should be able to distinguish company policy from company procedures.

(1) *Company policy* is made by top level management, usually by the president or a senior operating official by delegation. This may vary, depending upon the size of the company. A review of the company's policy by the analysis team could well reveal that company policy is consistent with FAA requirements, but a review of company procedures might indicate them to be contrary to company policies.

(2) On the other hand, both policies and procedures could be found to be in conformance with FAA requirements, whereas the operator's practices are not. It is the responsi-

bility of the operator's management to carry out policy and procedures in accordance with regulatory requirements. If this does not result, then there is a breakdown in the operator's management system which could be due to a number of factors such as poor communications, no delegation of authority, lack of follow-up procedures, lack of supervision, or incompetent management personnel.

(3) *Sometimes it is difficult* to distinguish between policy and procedure. Reduced to the simplest terms, an operator's policy, for example, could be to comply with FARs but the procedures prescribed in his manual might permit continuance of flight with certain required items of equipment inoperative.

(4) *The following outline summary of the foregoing might be helpful:*

(a) Company policy determined by:	—Top management	
(b) Company policy must be consistent with:	—Regulations Operating Certificate Economic authority Operations Specifications	
(c) Company procedures determined by:	—Manuals Middle-management decisions Operations performance	
(d) Company procedures must be consistent with:	—Company policy Regulations Operations Specifications	
(e) Company policy carried out by:	—Middle management	
(f) Company procedures carried out by:	—Crewmembers and dispatchers	

503-509. *RESERVED.*

SECTION 2. AIR CARRIER OPERATIONS

510. *AIR CARRIER OPERATIONS ANALYSIS AREAS.*

a. *Records and Crew Scheduling.*

(1) Crewmember and dispatcher training records.
(2) Check airman and examiner records.
(3) Crew scheduling and procedures.
(4) Route and airport qualification records—pilot and dispatcher.
(5) Financial records—commercial operator.

b. *Facilities.*

(1) Communications/communication records.
(2) Dispatch and meterology.
(3) Airports/line station facilities.
(4) Flight following.
(5) Trip papers (load manifest, release, etc.).
(6) Operations forms.

c. *Flight Operations Policies and Procedures.*

(1) Dispatch/flight following.
(2) Management control.
(3) Operational control.
(4) Manuals and bulletins.

d. *Ground Station Personnel Training.*

(1) Operations representatives.
(2) Weight and balance techniques.
(3) Load masters.
(4) Cargo handlers.

511. *INSPECTION PROCEDURE.* Following the review of the operator's organization policies, and procedures, the team determines whether or not the actual operation is in accordance with company policies and procedures, the FAR, and operations specification by any or all of the following means:

a. *On site inspections of facilities.*
b. *Discussion with operator's personnel.*
c. *Records review.*
d. *Records and manual cross-checking.*
e. *Verification of operational problems* by checking ATS facility records.
f. *Violation and complaint review.*
g. *Accident and incident review.*
h. *Review of ACDO correspondence.*
i. *Discussions with ACDO personnel.*
j. *Financial evaluation.*
k. *Checking compliance* disposition and qualifications of company officials and airmen using compliance and security investigators, auditors, and regional counsel as deemed necessary.
l. *Discussions with ATC personnel and other operators.*
m. *Meet with principal inspectors and local representatives* of airmen organizations to discuss any items of mutual interest.
n. *Any other source of information pertinent to the analysis.*

512. *INSPECTION GUIDELINES.* These guidelines are designed to give the inspector a better idea of how the systemsworthiness analysis should be conducted by discussing several (but not all) of the subareas of the four analysis areas:

a. *Air Carrier Records and Crew Scheduling.* The inspector should determine the adequacy of the system for assuring that only QUALIFIED personnel are utilized in their areas of responsibilities.

(1) *Crewmember and Dispatcher Training Records.*

(a) *Training Records.* The inspector should spot-check the accuracy of the training records of crewmembers and dispatchers by verifying that the training was actually given on the date specified. In the case of flight training, this can be done by comparison

with the aircraft logbook page pertaining to the date in question. If further checking is necessary, the inspector might consider a review of flight plan information on file at Air Traffic Service (ATS) facilities or interrogation of the airmen concerned.

1 The inspector should also determine the adequacy of the procedures used for scheduling crewmembers for required training and checks.

2 If problems are encountered in this respect, inspector should discuss the matter with the person responsible for maintaining the training records.

3 From this discussion the inspector should determine the source of the problem which might be due to any of the following:

(a) The person in charge of the training records does not know his job, either through incompetency or he has not been properly trained. In either case the matter must be pursued further with higher echelon.

(b) Company practice not in conformance with company policies or procedures concerning company records.

(c) Incorrect interpretation of regulatory requirements.

(d) The recordkeeping system itself is overly complex as to preclude timely scheduling of required training and checks.

(2) *Check Airmen and Examiners Records.*

(a) The inspector should review the flight-checking records of company check pilots to determine whether certain check pilots either give a high percentage of down checks or never give a down check.

(b) These records should be compared with those flight checks conducted with an FAA inspector on board.

(c) Any significant differences in the percentage of down checks between individual check pilots, company check pilots and FAA inspectors, or individual FAA inspectors must be reported to the principal inspector for his resolution.

(3) *Facilities.* The inspector shall determine that the operator has a system to insure the continued adequacy of airports and facilities for the operations conducted.

(a) Does the system provide for public protection, wet runway operation, discontinuing operations when unsafe weather conditions exist, operations during airport or other construction affecting flight safety?

(b) When an operator's system is determined to be adequate, line station SAMPLING should be accomplished to assure that it operates. The selection of facilities to sample will be coordinated with the principal inspector.

(4) *Communications.* Determine whether company communications facilities provide adequate communications between the dispatch centers and aircraft in flight.

(a) The best and most practical ways of determining this are through personal observations and discussions with working dispatchers.

(b) If deficiencies are disclosed, the team will consult with the principal operations inspector to determine the required course of action.

(c) Corrective action will be initiated through the principal operations inspector either immediately or following the systemsworthiness analysis. In the latter case, the principal inspector should handle the matter

during the post-inspection briefing of the operator.

(5) *Dispatch and Meterology.* This area can best be handled by one or, at the most, two members of the systemsworthiness analysis team.

(a) This inspection should also encompass dispatch procedures, which is a sub-item under the policies and procedures analysis area.
(b) The dispatch center is the initial focal point at which all operations policies and procedures are translated into action.
(c) Prior to the inspection, it is most important that the inspector carefully review the dispatch policies and procedures prescribed in the air carrier's manual.
(d) The on-site inspection should entail, as a minimum, a complete 8-hour shift at the dispatch center during peak periods and during IFR weather conditions if possible.
(e) The inspector should observe pilot briefings and debriefings with particular emphasis on the terms and conditions of the dispatch release. Considerable time should be spent in observing flight-following and in discussions with working dispatchers.
(f) During the visit, the inspector must carefully note whether the dispatch function as carried out in practice is consistent with company policies and procedures.
(g) The inspector should determine whether dispatcher workload has any effect on safety. In this regard, note whether dispatchers are required to perform an excess amount of non-dispatch functions such as crew scheduling, clerical duties, relaying messages, etc. Additionally, determine that dispatchers are not being required to handle too many flights.
(h) Particular attention should be given to the procedures followed in the dispatch of a

flight to determine whether the dispatcher is sharing responsibility with the pilot in the release of the flight considering turbulent weather conditions, information on navigation facilities, airports, and compliance with the minimum equipment list. Also, that during flight the dispatcher provides the pilot with any additional available information which may affect the safety of the flight.

(i) Determine the adequacy of the operator's system for restriction or suspension of operations in conditions that are a hazard to safe operations.

(j) During visits to air carrier dispatch offices, inspectors should meet with individual dispatchers to obtain an impression of the dispatchers' knowledge of regulatory requirements and discuss mutual problems and possible resolutions. Deficiencies might be caused by:

1 Lack of knowledge of individual dispatchers which could be due to a lack of training or incompetence. In either case, pursue the matter further to higher echelon.

2 Inadequate company policies and/or procedures. Corrective action should be initiated through the principal inspector immediately or at the conclusion of the systemsworthiness analysis as dictated by the severity of the deficiency.

3 Incorrect application of regulatory requirements. In this case, immediate corrective action may be in order.

b. *Flight Operation Policies and Procedures.* Guidelines for the basic approach to this area are covered in operators' policies and procedures. In analyzing this area, attention should be directed toward problem systems such as:

(1) Transportation of dangerous/hazardous articles.

(2) Security and hi-jacking.

c. *Ground Station Personnel Training.* Although not required by regulation, many operators conduct formal training of ground station personnel. Team members should review the training curriculum applicable to such items as weight and balance, carriage of dangerous articles, security and hi-jacking, and ramp safety. One of the more significant aspects is the checking of load manifests for accuracy. If feasible, observations should be made of classroom instruction.

(1) Deficiencies such as individual incompetence, lack of training, or inadequate instructions may be detected. However, the objective is to determine if there is a practical system to train ground personnel.

(2) Give consideration to, and make recommendations relative to regulation of the training of ground personnel.

513.-599. *RESERVED.*

SECTION 3. GENERAL AVIATION OPERATIONS

560. *PURPOSE.* This section provides guidance and procedural instructions applicable to pilot training schools certificated and operated under the provisions of FAR 141 and air taxi/commercial operators of small aircraft certificated and operated under the provisions of FAR 135. The instructions and guidance material contained in Section 2 of this chapter will apply to air taxi/commercial operators of large aircraft certificated under the provisions of FAR 135.2.

561. *AIR TAXI/COMMERCIAL OPERATOR ANALYSIS AREAS.* The areas of the operator's systems selected for analysis are listed below. The areas are broken down into subareas which should be evaluated during the analysis. Normally, all operations systems will be evaluated during each SWAP visit to an operator. These guidelines are designed

to give the operator a better idea of how the systemsworthiness analysis should be conducted:

a. *Pilot Training Program.*

(1) *Curriculum.* The Pilot Training curriculum will be reviewed to determine that the operator's program is appropriate to the operations to which each required pilot is to be assigned. It should ensure that, if followed, each pilot will have the required knowledge and competence prior to his use in air taxi operations. Whenever possible, training periods should be observed. Analysis in this area should be directed toward possible system deficiency.

(2) *Records.* The inspector should spot check the accuracy of the training records of individual airmen by verifying that the training was actually given on the date specified. In the case of flight training, this can be done by comparison with the aircraft logbook page pertaining to the date in question. If further checking is necessary, the inspector might consider a review of flight plan information on file at Air Traffic Service (ATS) facilities or interrogation of the airman concerned.

(3) *Scheduling.* The inspector should determine the adequacy of the records and procedures used for scheduling required training and checks. If problems are encountered in this respect, the inspector should discuss the matter with the person responsible for maintaining training scheduling. Discrepancies noted in the above categories might be caused by:

(a) The person in charge does not know his job either through incompetency or he has not been properly trained. In ei-

their case the matter might be pursued further with higher echelon.

(b) Company practice not in conformance with company policies or procedures concerning company records.

(c) Incorrect interpretation of regulatory requirements.

(d) The recordkeeping system itself is overly complex as to preclude timely scheduling of required training and checks.

(4) *Competency.* An appropriately rated team member will conduct en route inspections, observe training flights, and conduct or observe a proficiency check during the course of the SWAP visit. This will be a sampling process and it is not intended that the team will evaluate all pilots in all types of pilot checks during a normal scheduled analysis. Deficiencies revealed during the sampling process might be caused by any of the following:

(a) The airman did not receive adequate training which in turn might be due to inadequate instruction.

(b) The airman is unable to remain proficient between required training periods. If this is the case, a reexamination of the airman is in order.

(c) It may be only a simple case of "check-i-tis."

(d) Training policies and procedures are inadequate which could either require immediate action through the principal inspector or action following completion of the analysis depending upon the circumstances.

b. *Flight Attendant Training Program.*

(1) *Curriculum.* Team members should determine whether the training curriculum meets the requirements for initial and recurrent training. This should be done by a review of the operator's training program and whenever feasible by observing classroom instruction, emergency drills, passenger briefing procedures, and by discussions with indivdual flight attendants.

(2) *Records.* The inspector will spot-check the accuracy of the training records of individual flight attendants to verify that the required training was actually given.

(3) *Competency.* The inspector will, during en route inspections, determine the competency of the flight attendant. This can be accomplished by observing the actions of the individual and comparing these with procedures contained in the operations manual.

(4) *Discrepancies noted* in the above categories might be caused by:

(a) The individual does not know his job either through incompetency or he has not been properly trained.

(b) Company practice is not in conformance with company policies or procedures.

(c) Incorrect interpretation of regulatory requirements.

c. *Flight Operations Policies and Procedures.* During the en route inspection, the inspector can verify whether company policies and procedures as described in the operator's manual are carried out in actual practice. The inspector should:

(1) Determine whether the flight was properly dispatched. An important aspect of the dispatch procedure is a determination that the flight was released in accordance with the applicable requirements.

(2) Direct their efforts toward the detection of system deficiencies rather than individual discrepancies.

562. *PILOT TRAINING SCHOOL ANALYSIS AREAS.*

The areas of the operator's systems selected for analysis during each SWAP visit are set forth below:

a. *School Management.* The organization's system for communications between management, instructors, students, and other person concerned, to produce safe and effective training operations should provide a system to assure that:

(1) Recordkeeping is in compliance with Part 141 of the FARs and quality of instruction.
(2) Aircraft and equipment used are in airworthy condition and capable of performing for the lesson assigned before a student is dispatched for a flight.

b. *Quality of instruction depends upon the*:

(1) Relationship of the training received by students to that which is provided in the approved curriculums.
(2) Comparison of approved course curriculums to minimum standards of quality of instruction contained in Appendices A, B, and C, of Part 141.
(3) Procedure for acceptance of a student having previous pilot training leading to the course objective for enrollment in an approved course.
(4) Adequacy of time allotted to each lesson for post and preflight discussions with students by flight instructors.

c. *Personnel.* The following should be considered in evaluating pilot school personnel:

(1) Number of ground and flight instructors serving approved training courses.

(2) Familiarization of ground and flight instructors with the pertinent provisions of the FARs and approved curriculums.
(3) Students dispatched on solo flights under flight instructor's authority.
(4) Relationship of chief, flight instructor's performance with the prescribed responsibilities and requirements contained in FAR 141.
(5) Chief, flight instructor's procedure for monitoring instruction of other instructors and their proficiency.

d. *Aircraft and Equipment.* Give consideration to:

(1) Capability of aircraft and equipment for effective use in the curriculum approved.
(2) Adequacy of ground school equipment for the conduct of the approved courses.
(3) Adequacy of equipment and information for flight planning, weight and balance computations, and aircraft performance data for the courses approved.

563.-569. *RESERVED.*

GLOSSARY OF TERMS

SYSTEM—An array of components composed of policy formulation, organization clarification, standards of performance, individual analysis, help and information needed, sources of help and information needed, time schedules, and controls designed to work in unison and harmony towards a predetermined objective and ultimate goal.

SYSTEMSWORTHINESS ANALYSIS PROGRAM (SWAP)—A process of breaking a system down into its component parts for the purpose of assessing and reporting the worth of each component part and subsequently the entire system.

SUBSYSTEM—A major component of an entire system such as a procedure. A subpart of a system that is an integral part of a larger system.

ELEMENT OF A SYSTEM OR SUBSYSTEM—An essential resource such as money, manpower, machines, equipment, tools, space, material supplies, training, safety precautions, utilities, morale or other items of need essential to the suitable functioning of a system or subsystem.

ANALYSIS—A series of processes or techniques used in breaking a system down into its components and elements to aid in the process of measuring the worth and value of each component and element comprising the system. Analysis is a penetrating inquiry into the nature of things as to effect and cause relationships to aid the decision maker make a choice between possible alternatives and consequences.

SEVEN CONSTANT COMPONENTS OF ALL GOOD SYSTEMS

1. *POLICY FORMULATION*—Statements of intent.
   a. *GENERAL POLICIES*—Statements of ultimate purpose.
   b. *MAJOR POLICIES*—Statements of Intermediate objectives, quantifiable, qualitative, and timeliness.
   c. *DEPARTMENTAL POLICIES*—Methods and procedures for achieving objective.
2. *ORGANIZING*—Process of dividing the work to be done to reach the objectives sought. Assigning and limiting responsibility and authority, establishing working relationships channels for coordination and cooperation.
3. *STANDARDS OF PERFORMANCE*—Results expected from organizational elements, persons or items. Reasonable and attainable results expected from persons, items or things.
4. *INDIVIDUAL ANALYSIS*—Profiling position requirements, profiling of man specification, matching the two profiles and determining a course of action.

5. *HELP AND INFORMATION NEEDED*—Tools, machines, equipment, supplies, etc., and training individuals in their use, guidelines, directives, and the like.
6. *SOURCES OF HELP AND INFORMATION*—Policy, organization and procedure manuals. Specifications, blue prints, regulations, laws, reports, publications, texts, etc., training centers.
7. *TIME SCHEDULES*—Target dates, deadlines, time controls compatible with quantity and quality desired.

PRINCIPLE—A fundamental truth, FAR, a rule of thumb, guiding belief, a common practice a conventional way.

PROCESS CHART—A method for breaking a compound procedure down into its sequential steps. A detailed record of the successive steps in an activity or process. It sets down in chronological order everything that is done.

BEFORE STUDY—A process chart showing a process or procedure as it is currently being done.

AFTER STUDY—A process chart showing a proposal for modifying a current process.

SIGNIFICANT—Having possible effect on safety or compliance with applicable rules.

SURVEILLANCE—A continuing and intermittent inspection of a system or combination of systems and procedures. A reconnaissance survey, a close watch over events and trends to insure compliance with norm, regulation or standard practice(s).

APPRAISAL—An analysis of the worth or values of a system, item or thing. A surfacing of defects, a penetrating comparison of what-is with what-ought-to-be.

STANDARD—A device for measuring something, a result expected, a norm established by common practice, a description of what ought to be, a reasonably attainable objective or goal, a measure of quantity, quality and timeliness.

PROCEDURE—A process, routine, or prescribed sequence of steps or tasks to produce a desired result.

INSPECTION—A purposeful observation of an event, a document item or thing to closely examine quantity, quality or timeliness, compliance with regulation, norm, good standard practice, and safety. A close look at the performance of people and things.

EFFICIENCY PRINCIPLES IN ANALYSIS—An analytical technique using proven fundamental truths to aid the analyst or decision makers isolate defective areas, and provide clues for recommending choices from among proven alternative courses of action.

VERTICAL ANALYSIS—An analytical technique designed to aid the analyst or decision maker organize his thinking, diagnose a situation, reduce general situations to specific problems, eliminate trivia, clearly associate effect with cause and relate cure to cause, avoid treating symptoms rather than cause, and prepare preliminary reports.

STATISTICAL ANALYSIS—An analytical technique designed to aid an analyst or decision maker analyze quantitative data past, current and future; draw conclusions and inferences, project trends, and choose alternatives based on quantitative values.

COST/BENEFIT/EFFECTIVENESS ANALYSIS — An analytical technique designed to aid the decision maker, analyze, compare, and weigh the consequences of alternative courses of action against each other. A technique to aid in the process of persuasion.

VALUE ANALYSIS—An analytical technique designed to aid the decision maker make a best choice of alternative intangible values for improved effectiveness of resources.

NORMAL PROCESS OF SYSTEMS INSPECTION AND ANALYSIS (FIGURE 1)

1. Observe, using the 7 constant components to identify apparent problem areas.

2. Observe, using the principles to break the problem areas down further.
3. Observe, using the vertical analysis technique to further reduce the problem areas to more specific defects, causes and cures.
4. As determined by step 3, select the most suitable analytical or procedural technique to pinpoint the specific problem.
5. As determined by steps 3 and 4, use cost/benefit/effectiveness analysis to choose between alternatives available which reflect objective data.
6. As determined by 3, 4 and 5 use value analysis on subjective data.

All or any of the techniques will aid in selling the teams' recommendations.

[CHANGE] [8000.3C CHG 1]

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
Washington, D.C.

5/7/73
Cancellation
Date: after
filing

SUBJ: SYSTEMSWORTHINESS ANALYSIS PROGRAM

PURPOSE. This change provides revised information concerning SWAP inspection notification requirements and corrects two minor typographical errors on pages 349 and 350.

PAGE CONTROL CHART

Remove Pages	Dated	Insert Pages	Dated
101 thru 106 (thru 150)	4/14/72	101	5/ 7/73
		102	4/14/72
349 and 350 (thru 360)	4/14/72	103 thru 106 (thru 150)	5/ 7/73
		349 and 350 (thru 360)	5/ 7/73

/s/ C. R. Melugin, Jr.
Acting Director,
Flight Standards Service

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CHAPTER 3. HOW SYSTEM FUNCTIONS

100. *SCHEDULED SYSTEMSWORTHINESS ANALYSIS.* Tentative schedule of inspections will be prepared by SWAP covering at least a six-month period and distributed to the district offices.

This schedule will identify the name, address, type of certificate(s) and inspection date of each operator involved. When the principal inspector receives the SWAP schedule, written notification will be forwarded to the operators involved advising them of the intended dates of the SWAP visit.

101. *SPECIAL SYSTEMSWORTHINESS ANALYSIS.* Special systemsworthiness analysis will be conducted on an as-needed basis and may be requested by Washington headquarters, the regional office, or district office whenever there are indications that the performance of a particular operator is falling below an acceptable level. The procedures employed are the same as those followed in a scheduled analysis, except that the analysis is concentrated on those areas of operators' systems that are suspected of being deficient. Some conditions that would warrant a request for a special analysis are adverse trends in:

a. *Accidents and incidents.*

b. *Violations and complaints.*

c. *Financial condition.* Some examples of indications of financial stress that can be detected by inspectors are:

(1) Demands for "cash on delivery" by suppliers who formerly allowed credit.

(2) Curtailment of flight operations.

(3) Significant layoff of personnel.

(4) Significant employee turnover.
(5) Delays in meeting payrolls.
(6) Sale or repossession of aircraft.
(7) Inadequate maintenance of aircraft.

d. *Repetition of the same types of difficulties reported* under the Mechanical Reliability Reports (MRR) system over an extended period of time.
e. *Consistently high number of items* on the Mechanical Interruption Summary Reports (MIS).
f. *High percentage of uncompleted pilot-in-command flight checks.*
g. *High percentage of complaints concerning safety items.*

102. *TEAM BRIEFING.* The team leader, or the inspector designated as being in charge of the particular analysis, will brief the team members prior to the start of the inspection. This briefing should include the inspection plan, the inspection and analytical techniques to be used, the specific areas to be assigned to each team member, team conduct and actions in working with the operator, and the estimated time to complete the inspection. This briefing should also include any special information available from other sources such as MRR data, financial information and complaints. Team members will be cautioned not to discuss any of the team findings, conclusions, or opinion with anyone other than team members and appropriate agency personnel prior to the post-inspection briefing of the operator.

103. *DISTRICT OFFICE CHIEF OR PRINCIPAL INSPECTOR BRIEFING.* The Systemsworthiness Analysis team will be thoroughly briefed (operations or maintenance/avionics as appropriate) prior to the start of the inspection. This briefing should cover:

a. Operators' management structure and flow of responsibilities in the areas to be inspected.
b. Identify company personnel that the operator desires to be involved with inspection activities.

c. Discuss existing compliance posture of operator as related to inspection elements.
d. Identify known or suspected problem areas and status of any corrective action.
e. Review incident, accident, violation records of operator since the previous inspection of the elements involved and any trends determined or suspected.
f. Make requests for specific information or determinations to be obtained during inspection.
g. Information regarding operator/employee relationships, financial condition, new programs or plans, operator/FAA relationships.
h. Any other factors that could adversely affect the operators' performance or be of assistance to the teams.

104. *OTHER BRIEFINGS.* The inspection team will have free access to manuals, correspondence, and records pertaining to the operator, and any other appropriate data maintained by district offices. All material and data pertinent to the inspection will be studied by the team to acquaint them with the operator's policies, instructions, and procedures. It is essential that the team has a good working knowledge of the operator's management policies and procedures applicable to the area to be investigated before they meet with the operator. In this manner, the team will be better equipped to discuss intelligently the policies and procedures used by the operator in the direction and control of his enterprise.

105. *INITIAL MEETING WITH THE OPERATORS.*

a. *The district office chief or principal inspector shall arrange* for and chair the initial meeting of the inspection team and the operator. He will explain the purpose and scope of the inspection. In cases where a problem area is suspected to exist, it should be frankly discussed with the operator. This straight-forward approach will help to foster a feeling of mutual trust and respect that is beneficial, if not essential, to the

analysis. At this time, the operator will be advised that he will be informed of the team's findings at a meeting to be arranged by the district office at the conclusion of the inspection. The operator should be invited to stipulate any special areas that he would like the team to examine.

b. *At the initial meeting of SWAP and the operator*, the team leader will furnish the operator a written itinerary of the SWAP team including dates that facilities, subcontractors, suppliers, etc., will be visited. The operator should be advised that it will be his responsibility to advise the areas of the intended visits. This procedure will not apply to en routes, pilot proficiency checks or airman certification functions.

c. *The operator should also* be advised that experience has shown that rumors relating to FAA findings while the inspection is in progress are not unusual and should be disregarded. Such rumors usually stem from the searching nature of the questions posed by members of the team. Team members will normally not discuss findings with the operator's personnel during the onsite inspection. However, if a serious safety problem is disclosed during the inspection, the operator and the district office will be informed immediately by the SWAP team of the facts available so that prompt corrective action can be taken.

106. *THE SYSTEMSWORTHINESS ANALYSIS PROCESS.*

a. *As an essential preliminary*, each team member will familiarize himself with the operator's policies, organization, reporting system (records), and directives which govern the particular area to be analyzed. During the review and analysis, the team member should make notes and references to serve as memory-joggers during the inspection. This will minimize the need for subse-

quent research of manuals, records, and files to ascertain a specific practice or directive.

b. *A successful systemsworthiness analysis* requires careful fact finding and objective analysis. When a defect or questionable area is detected, a thorough search must be made to trace it back through the system to the causal point of origin. The inspector must concentrate on the area under analysis and pursue it to a positive completion so that a factual determination can be made.

This may occasionally involve consideration of other areas that were not originally intended for inspection. When this occurs, the new area should be investigated until factual conclusions can be drawn. It is important, however, that the inspector return to the area under consideration before he was sidetracked, since any loss of continuity could result in erroneous or incomplete findings.

c. *Defects existing in any organization* may result from a variety of causes. The team should be particularly alert to indications of inadequate communication or followup procedures and lack of effective delegations of authority. Identifying the defects and isolating the factors contributing to them may be expedited by applying the following procedures:

(1) *Lack of Supervision.* Check for the adequacy and understandability of instructions and directives, the training and competency of personnel. In this respect, do employees understand and effectively carry out company policies and procedures?

(a) Determine whether proper delegations of authority are made down through the organization. It is one thing to delegate authority and another to see that delegated authority is carried out effectively in accordance with established policies and procedures.

(b) The team must evaluate the adequacy of control exercised by management by determining how management follows up in order to ascertain policy and procedural compliance.

(c) Even if company policy is carried out through the organization, the basic policy or procedure could be wrong.

(2) *Inadequate Procedures.* Determine whether or not procedures are set forth clearly and are practicable of accomplishment.

(a) When analysis of a problem area discloses that existing instructions are inadequate or the system used in implementing instructions lacks proper definition, detail, or sensibility, then procedures should be the prime area of concern.

(b) Past inspections have revealed extremely cumbersome or impractical airman records systems. In those cases, inspections have disclosed violations of flight time limitations or failure to schedule crewmembers for required recurrent training. Past inspections have also disclosed areas where procedures were needed, but none were provided.

(c) It is imperative that the operator has established adequate procedures to monitor compliance with company policy and FAR requirements.

(3) *Fraudulent Records.* When the team suspects that the operator is falsifying his records, assistance by regional Air Transportation and Security, Audit and Legal personnel may be necessary.

(a) A simple cross-checking of company records may reveal discrepancies such as checking aircraft logbooks against training records.

(b) Another technique successfully used in the past has been to check flight plan information available in ATS facilities against company records.

(4) *The art of asking the right question* at the right time and of the right person is one of the key attributes of a successful systemsworthiness analysis. This art should be employed continuously by team members during an inspection, since it serves to expose abstract areas, confirms or disproves adherence to the established systems, and provides an insight into the acceptance and applicability of established policies and procedures.

d. *Team members* should not confine their inquiries to any particular group of personnel or organizational level. It may be anticipated that supervisory personnel ought to be well-versed in the policies, organization, and procedures governing the work functions for which they are responsible. However, they may be unaware of trouble spots existing at lower echelons or shortcuts taken at the working level that may adversely affect compliance with the regulations and accepted standards of safety.

107. *POST-INSPECTION MEETING WITH THE OPERATOR.* The district office chief or the principal inspector shall arrange for, and serve as agency spokesman in the post-inspection meeting with the operator. All findings discussed at the meeting must be fully supported by facts acquired by the team. However, the operator should be given ample opportunity to present additional facts which he feels mitigate defects found by the inspection team.

108.-199. *RESERVED.*

f. *Maintenance Performance.* Maintenance performance is the function generally referred to as "maintenance" and includes responsibility for

actual work processes of overhaul, repair, alteration, adjustment, and checks of the aircraft and its systems and components.

(1) The maintenance performance organization must possess capability through adequate facilities, competent personnel, practical instructions and procedures, attainable standards, and effective controls regardless of variations in size and complexity. Careful evaluation of these factors is essential to a successful analysis of the maintenance function. The following questions are directed toward making such a determination:

(a) What is the line of authority and responsibility of mechanics? What is relationship of maintenance organization to purchasing, training, inspection, engineering, and production control? Where in the organization do these segments answer to a common head?

(b) Under what condition can "maintenance" deviate from published standards?

(c) What level of supervision can fire and hire? Issue reprimands for record?

(d) What is general level of mechanic intelligence as indicated by his educational background, formal schooling, trade schools, etc.? What is mechanic expected skill level as indicated by his experience with the company and with industry? Are mechanics assigned work on a specialist's concept? How many mechanics are certificated?

(e) Are adequate tools, manuals, and facilities available?

(f) Are contract mechanics used at line stations?

(g) What is source of newly hired mechanics? Do mechanics move about system?

(h) Is there a system established by which a deficiency found by mechanics can be made known to personnel with authority for having it corrected?

g. *Performance Analysis* is a function of the overall maintenance system which evaluates product performance and identifies problem areas.

(1) *It detects deficiencies,* signals the need for corrective action, and monitors the effect of the action. It provides inputs to the engineering department to effect modification, to quality control to provide standards, to inspection to revise techniques, to production control to provide rescheduling, etc., inherent in this activity, is data collection and technical investigation.

(2) *Analysis of the procedures and control* exercised by this organization and the effectiveness of their coordination with other organizational elements should be carefully considered. Following are typical questions for analysis in this area:

(a) What is the source of basic information on service difficulties? Is there more than one source? What are they? Are any useful sources being overlooked or omitted?

(b) Are these adequate instructions for completion of reports on service difficulties? Are they understandable? Are they usable? Are they followed?

(c) Is there a system for reporting difficulties encountered during operation of aircraft? During overhaul? During routine inspection?

(d) Is responsibility for reporting difficulties spelled out in sufficient detail to be meaningful?

(e) Who is this information directed to? Do they get it all?

(f) Does each department receive and analyze its own difficulties? How are upper echelons advised of how the operation is going.

(g) Are personnel analyzing difficulties capable and trained to perform this function?

(h) What is required to initiate corrective action once a problem has been identified? Is the responsibility for implementing this requirement spelled out?

(i) What use is made of industry's problems in analyzing the difficulties being experienced by the air carrier?

(j) Are fixes established based on problems being encountered by industry before they occur on the carrier being analyzed? Are MRR reports used for this purpose?

(k) Are boards of inquiry established for major problem areas such as engine failures, structural failures, etc.? Who makes up this board?

402.-429. *RESERVED.*

[CHANGE] [8000.3C CHG 2]

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

12/11/73
Cancellation
Date: After
filing

SUBJ: SYSTEMSWORTHINESS ANALYSIS PROGRAM

1. *PURPOSE.* This change provides information concerning SWAP and district office coordinating work program.

2. *EXPLANATION.* This change aligns Order 8000.3C with Handbook 1800.12C to provide for the SWAP team conducting the programmed portion of the district office program.

PAGE CONTROL CHART

Remove Pages	Dated	Insert Page	Dated
1 thru 52 (thru 100)	4/14/72	1 (thru 50)	12/11/73
		51	4/14/72
101	5/ 7/73	52 (thru 100)	12/11/73
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103 and 104	5/ 7/73	102	12/11/73
105 and 106 (thru 150)	5/ 7/73	103 and 104 (thru 150)	12/11/73

/s/ C. R. Melugin, Jr.
Acting Director,
Flight Standards Service, AFS-1

Distribution: WRCMFS-3, FFS-1, 2, 3, 5, 7, 8 (all employees); FIA-O (minimum); AAC-955 (80 copies)

Initiated By: AFS-320

CHAPTER 1. POLICIES AND OBJECTIVES

1. *GENERAL.* The Flight Standards Systemsworthiness Analysis Program is a systems approach to fulfill agency responsibilities for inspection and surveillance of operators having formalized systems that cannot be monitored effectively using customary surveillance techniques. It is aimed at determining the causal factors which allow a system to deteriorate rather than the symptoms that are a result of such deterioration. The task of the SWAP team is to supplement the process of surveillance with an indepth analysis of operators' systems and subsystems to determine if system objectives are being achieved. SWAP augments the district office (DO) permitting the principal inspector to maintain surveillance of the overall posture of the operator. The key features of the Systemsworthiness Analysis Program are:

   a. *Modifying maintenance and operations surveillance inspection practices* to a comprehensive systemsworthiness concept in order to effect better utilization of district office inspector personnel.
   b. *Utilizing teams of inspectors* to perform programmed and special inspections, to relieve district office inspectors from doing necessary and time-consuming indepth analysis.
   c. *Employing sophisticated analytical techniques on* performance and reliability data to better point inspection efforts toward critical areas.
   d. *Defining the relationship and roles of the SWAP and district office inspector* as related to systemsworthiness analysis activities.

2. *MAJOR POLICY OBJECTIVES.* The objective of the Systemsworthiness Analysis Program are to:

   a. *Provide more efficient utilization* of inspector personnel, both DO and SWAP.
   b. *Provide an accurate and penetrating analysis* of all components of the operator's systems.

c. *Improve the quality of FAA inspections* of air carriers, commercial operators, air travel clubs, air taxi operators, repair stations, airmen schools, and other appropriate industry segments.

d. *Improve the effectiveness of primary agency representatives* in the district office.

e. *Reduce*, to the maximum extent practicable, indepth inspections by district office inspectors assigned to an operator to permit these inspectors to maintain surveillance of the overall posture of the operator to determine any sensitive areas which may require examination by the SWAP team.

3. *WITHDRAWN*—CHANGE 2.

4.-49. *RESERVED.*

CHAPTER 2. ORGANIZATION

50. *MISSION AND FUNCTIONS.* SWAP teams are established as an element to the Flight Standards Division/Staff to perform indepth analysis of commercial aviation operators. The product of the team effort is a report of findings and recommendations and is provided to the air carrier/general aviation district office chief and/or principal inspectors who have responsibility for determining what corrective action is to be taken. To the extent practicable, each region will conduct systemsworthiness analysis of assigned operators on a systemwide basis.

51. *STRUCTURE.* A SWAP team should be established in each region. Regions that do not have an FAR 121/123/127 operator that is subject to a SWAP inspection shall not be established or continue an air carrier SWAP organization. Team members will be responsible to a chief as determined by regional organizational flow chart.

52. *SELECTION PLACEMENT AND DEVELOPMENT OF SWAP INSPECTORS.* Since the success of the Systemsworthiness Analysis Program

depends in no small part of the quality of the personnel selected, particular attention should be given to the choice of the team members. In addition to the basic experience and tactical qualifications required of an inspector, the following is considered essential:

Basis of Selection.

a. Broad technical training and experience.
b. Indoctrinated in the techniques of Systems Analysis.
c. Demonstrated ability to analyze systems effectively.
d. One year experience in a D.O. at the journeyman level.
e. Demonstrated ability to communicate effectively including oral and written presentations.

53. *PHYSICAL LOCATION.* Each regional director, or Assistant Administrator, European Region, having certificate responsibility, shall determine the location(s) of the SWAP team(s) based on the location of major workload, facilities, travel and per diem requirements, etc. The use of split teams is a prerogative of the regional director and is recommended where efficiency, expenses, team morale, etc., are significant factors.

54. *TEAM COMPLEMENT.* The size and makeup of the team required to perform a scheduled or special analysis will vary depending on the number of functional areas to be covered, the size and complexity of the operator, etc. Team assignments and scheduling are the responsibility of the Chief, Systemsworthiness Analysis.

55. *ORGANIZATIONAL RELATIONSHIP OF SWAP TEAM AND DISTRICT OFFICE.* The team will support the district office by providing reliable reports of facts, analysis and conclusions as a result of their systems analysis of an operator. The team will also accomplish that portion of the district office's work program established in accordance with Handbook 1800.12C.

The district office and the team will work in close harmony to accomplish the FAA's objective.

While the team is conducting an inspection they should keep the district office advised of their progress. If a serious safety problem is disclosed during the inspection, the district office will be informed immediately so that prompt corrective action can be taken.

56. *RECOMMENDATIONS FOR REGULATORY CHANGES.* The SWAP team is in an excellent position for detecting the need for amendments to the FARs. Team members are encouraged to submit proposed changes to the FARs by separate letter to the Regional Chief, Flight Standards Division/ Staff for further forwarding to Washington Headquarters.

57.-99. *RESERVED.*

CHAPTER 3. HOW SYSTEM FUNCTIONS

100. *SCHEDULED SYSTEMSWORTHINESS ANALYSIS.* Tentative schedule of inspections will be prepared by SWAP covering at least a six-month period and distributed to the district offices.

This schedule will identify the name, address, type of certificate(s) and inspection date of each operator involved. When the principal inspector receives the SWAP schedule, written notification will be forwarded to the operators involved advising them of the intended dates of the SWAP visit.
Every effort will be made to adhere to the published inspection dates. They will be considered firm and changed only after serious consideration and full coordination between SWAP and the district office concerned.

101. *SPECIAL SYSTEMSWORTHINESS ANALYSIS.* Special systemsworthiness analysis will be conducted on an as-needed basis and may be requested by Washington headquarters, the regional office, or district office whenever there are indications that the

performance of a particular operator is falling below an acceptable level. The procedures employed are the same as those followed in a scheduled analysis, except that the analysis is concentrated on those areas of operators' systems that are suspected of being deficient. Some conditions that would warrant a request for a special analysis are adverse trends in:

a. *Accidents and incidents.*
b. *Violations and complaints.*
c. *Financial condition.* Some examples of indications of financial stress that can be detected by inspectors are:

(1) Demands for "cash on delivery" by suppliers who formerly allowed credit.
(2) Curtailment of flight operations.
(3) Significant layoff of personnel.
(4) Significant employee turnover.
(5) Delays in meeting payrolls.
(6) Sale or repossession of aircraft.
(7) Inadequate maintenance of aircraft.

d. *Repetition of the same types of difficulties reported* under the Service Difficulty Reports (SDR) system over an extended period of time.
e. *Consistently high number of items* on the Mechanical Interruption Summary Reports (MIS).
f. *High percentage of uncompleted pilot-in-command flight checks.*
g. *High percentage of complaints concerning safety items.*

102. *TEAM BRIEFING.* The team leader, or the inspector designated as being in charge of the particular analysis, will brief the team members prior to the start of the inspection. This briefing should include the inspection plan, the inspection and analytical techniques to be used, the specific areas to be assigned to each team member, team conduct and actions in working with the operator, and the estimated time to complete the inspection. This

briefing should also include any special information available from other sources such as SDR data, financial information and complaints. Team members will be cautioned not to discuss any of the team findings, conclusions, or opinions with anyone other than team members and appropriate agency personnel prior to the post-inspection briefing of the operator.

103. *DISTRICT OFFICE CHIEF OR PRINCIPAL INSPECTOR BRIEFING. The* Systemsworthiness Analysis team will be thoroughly briefed (operations or maintenance/avionics as appropriate) prior to the start of the inspection. This briefing should cover:

a. Operators' management structure and flow of responsibilities in the areas to be inspected.
b. Identify company personnel that the operator desires to be involved with inspection activities.
c. Discuss existing compliance posture of operator as related to inspection elements.
d. Identify known or suspected problem areas and status of any corrective action.
e. Review incident, accident, violation records of operator since the previous inspection of the elements involved and any trends determined or suspected.
f. Make requests for specific information or determinations to be obtained during inspection.
g. Information regarding operator/employee relationships, financial condition, new programs or plans, operator/FAA relationships.
h. Any other factors that could aversely affect the operators' performance or be of assistance to the teams.
i. That portion of the district office program SWAP will accomplish.

104. *OTHER BRIEFINGS.* The inspection team will have free access to manuals, correspondence, and records pertaining to the operator, and any other appropriate data maintained by district offices. All

material and data pertinent to the inspection will be studied by the team to acquaint them with the operator's policies, instructions and procedures. It is essential that the team has a good working knowledge of the operator's management policies and procedures applicable to the area to be investigated before they meet with the operator. In this manner, the team will be better equipped to discuss intelligently the policies and procedures used by the operator in the direction and control of his enterprise.

105. *INITIAL MEETING WITH THE OPERATORS.*

a. *The district office chief or principal inspector shall arrange* for and chair the initial meeting of the inspection team and the operator. He will explain the purpose and scope of the inspection. In cases where a problem area is suspected to exist, it should be frankly discussed with the operator. This straight-forward approach will help to foster a feeling of mutual trust and respect that is beneficial, if not essential, to the analysis. At this time, the operator will be advised that he will be informed of the team's findings at a meeting to be arranged by the district office at the conclusion of the inspection. The operator should be invited to stipulate any special areas that he would like the team to examine.

b. *At the initial meeting of SWAP and the operator*, the team leader will furnish the operator a written itinerary of the SWAP team including dates that facilities, subcontractors, suppliers, etc., will be visited. The operator should be advised that it will be his responsibility to advise the areas of the intended visits. This procedure will not apply to en routes, pilot proficiency checks or airman certification functions.

c. *The operator should also* be advised that experience has shown that rumors relating to FAA findings while the inspection is in progress are not unusual and should be disregarded. Such

rumors usually stem from the searching nature of the questions posed by members of the team. Team members will normally not discuss findings with the operator's personnel during the onsite inspection.

106. *DISTRICT OFFICE CHIEF OR PRINCIPAL INSPECTOR BRIEFING.* The Systemsworthiness Analysis team will debrief the district office at the conclusion of their inspection. At this meeting all findings will be discussed prior to meeting with the operator, thereby preparing the agency spokesman for the post-inspection meeting with the operator. At this time the team will also furnish the district office with copies of appropriate FAA forms covering that portion of the district office work program accomplished by the team.

107. *POST-INSPECTION MEETING WITH THE OPERATOR.* The district office chief or the principal inspector shall arrange for, and serve as agency spokesman in the post-inspection meeting with the operator. All findings discussed at the meeting must be fully supported by facts acquired by the team. However, the operator should be given ample opportunity to present additional facts which he feels mitigate defects found by the inspection team.

108.-199. *RESERVED.*

[CHANGE] [8000.3C CHG 3]

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

7/24/74
Cancellation
Date: after
filing

SUBJ: SYSTEMSWORTHINESS ANALYSIS PROGRAM

PURPOSE: This change realigns the contents of this Order in a more realistic fashion, and introduces a new reporting procedure using FAA Form 8000-27.

PAGE CONTROL CHART

Remove pages	dated	Insert pages	dated
iii and iv	4/14/72	iii and iv	7/24/74
151 thru 348	4/14/72	151 thru 401	7/24/74
349 and 350 (thru 360)	5/ 7/73		
361 thru 434	4/14/72		
Appendix 1 pages 1 thru 3	4/14/72	Appendix 1 pages 1 thru 5	7/24/74
		Appendix 2 pages 1 and 2	7/24/74

/s/ R. P. Skully
R. P. SKULLY
Acting Director, Flight Standards Service

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CHAPTER 4. SYSTEMSWORTHINESS ANALYSIS PROGRAM

200. *PURPOSE.* This chapter provides guidance and procedural instructions applicable to the subsystems within the overall Flight Standards Systemsworthiness Analysis Program.

201. *OBJECTIVE.* The Systemsworthiness Analysis Program applies techniques to assure:

a. *An adequate and penetrating assessment* of all elements of the operator's systems.

b. *Improved effectiveness* of all surveillance functions through analysis of the vital elements of the operator's systems.

c. *The acquisition of factual data* relating to the status of the operator's compliance with applicable Federal Aviation Regulations.

d. *A factual determination* of the operator's systems to provide safe operations.

202. *THE ANALYSIS PROCESS.* This is the process by which the team conducts an inspection of the assigned areas of an operator's systems. The team members will familiarize themselves with the operator's organization, policies, reporting system (records), and directives which govern the areas to be analyzed.

The team verifies the application, acceptance and comprehension of top management policies at all levels. When only partial application, acceptance or comprehension is found, the cause or causes for deviations must be determined. It is imperative that the glossary of terms and definitions set forth in Appendix I be referred to in accomplishing a systems analysis.

a. *Identify and Isolate Defective Areas.* A successful systemsworthiness analysis requires careful fact finding and objective analysis. When a defect or questionable area is detected, a thorough search must be made to trace it back through the system to the causal point of origin.

This occasionally may involve consideration of other areas that were not originally intended for inspection. When this occurs, the new area should be investigated only enough to reach a factual conclusion. Then the inspector must return to the original area of inspecton, since any loss of continuity may result in erroneous or incomplete findings.

Defects existing in any organization may result from a variety of causes. The team should be particularly alert to indications of inadequate communications or follow-up procedures and lack of effective delegation of authority. Identifying and isolating the defects may be accomplished more readily by evaluating these areas first.

(1) *Supervision.* Check for the adequacy and understandability of instructions and directives, the training and competency of personnel. In this respect, do employees understand and effectively carry out company policies and procedures?

(a) *Determine* whether proper delegations of authority are made down through the organization. It is one thing to delegate authority and another to see that delegated authority is carried out effectively in accordance with established policies and procedures.

(b) *The team must evaluate* the adequacy of control exercised by management by determining how management follows up in order to ascertain policy and procedural compliance.

(c) *Even if company policy is carried out* through the organization, the basic policy or procedure could be wrong.

(2) *Manual and Written Procedures.* Determine whether or not procedures are set forth clearly and are practicable of accomplishment.

(a) *When analysis of a problem area* discloses that existing instructions are inadequate or the system used in implementing instructions lacks proper definition, detail, or sensibility, the procedures should be the prime area of concern.

(b) *Past inspections have revealed* extremely cumbersome or impractical airman records systems. In those cases, inspections have disclosed violations of flight time limitations or failure to schedule crewmembers for required recurrent training. Past inspections have also disclosed areas where procedures were needed, but none were provided.

(c) *It is imperative* that the operator establish adequate procedures to monitor compliance with company policy and FAR requirements.

(3) *Records.* When the team suspects that the operator is falsifying his records, assistance by regional Air Transportation and Security, Audit and Legal personnel may be necessary.

(a) *A simple cross-checking* of company records, such as checking aircraft logbooks against training records, may reveal discrepancies.

(b) *Another technique successfully used* in the past has been to check flight plan information available to ATC facilities against company records.

b. *Methods of Determination*

(1) *In making a determination as to cause and effects* of deviation from significant policies, certain lead words can be used advantageously (who, what, when, where, why and how). The type of modifiers to be used with these lead words would be dependent upon the information being sought; e.g., HOW was it authorized (in

writing or verbal), WHO authorized the change, etc. The use of such words discourages a "yes" or "no" answer. They tend to draw out the person making the reply and open up avenues for further questions. These fundamental lead words are highly effective analysis tools, when used in a reasonable manner, by a good listener.

(2) *The art of asking the right question* at the right time and of the right person is one of the key attributes of a successful systemsworthiness analysis. This art should be employed continuously by team members during an inspection, since it serves to expose abstract areas, confirms or disproves adherence to the established systems, and provides an insight into the acceptance and applicability of established policies and procedures.

(3) *The verification process* of the Systemsworthiness Analysis Program is also used at the employee level. The techniques employed at this level are the same as those used for the submanagement and supervisory levels. Employees below the supervisory level should not be interviewed about major company policy matters.

(4) *It is apparent, that should the penetration phase* of SWAP be applied to all deviations regardless of their significance, the analysis process would be cumbersome and time-consuming. Therefore, before the penetrating processes are used on a deviation, their probable impact on compliance with FARs and the effectiveness of the overall system should be analyzed by the team. Should the analyses show deviation that would adversely affect the integrity of the system, etc., employ the penetration processes. If, on the other hand, the analyses indicate the deviation is not significant to the overall program, it should be noted by the team for discussion and disposition by the principal inspector.

203.-299. *RESERVED.*

CHAPTER 5. REPORTING

300. *PRELIMINARY REPORT.* A preliminary report will be prepared by the team following completion of the inspection. This data must be clear, concise and a factual record of the teams' findings and discussions. Following the SWAP debriefing of the district office, and subject to any changes, this report becomes part of the SWAP-review report. Only the findings and discussion portion of the SWAP-review report may be transmitted to the operator for his official notification.

301. *REPORT OF SYSTEMSWORTHINESS (RIS: 8000-3).*

a. The Systemsworthiness Analysis Review Report (FAA Form 8000-27) is the official record of the evaluations conducted. This report will be completed by the team leader and distributed and signed by the team leaders' chief.

302. *INSTRUCTIONS FOR PREPARING FAA FORM 8000-27, SYSTEMSWORTHINESS ANALYSIS PROGRAM—REVIEW REPORT.*

(Item numbers and captions below correspond to item number on the form, Appendix 2)

1. *Name of Operator and Location.* Self explanatory.
2. *Type Operation and Applicable FAR.* Indicates whether air carrier, air taxi, repair station, etc., and the FAR under which the operator is certificated and operates.
3. *Inspection.* Indicates if this was a regularly scheduled inspection or special inspection. If special inspection, show who requested this inspection.
4. *Dates Analysis Conducted.* The starting date would be the first day the team conducted business at the operator's facilities. The ending date is the date the team departed the operator's

facilities and not the date the form was completed.

5. *Functions Analyzed.* Enter the functions of the operator that were analyzed during this inspection. If functions were satisfactory enter "X" in satisfactory column. If unsatisfactory, enter the number or letter of attachments that outline the unsatisfactory findings, and discussions related to that function.
6. *Alleged FAR Noncompliance.* Enter the function in which an alleged violation of the FAR's is suspected and the applicable FAR. Enter number or letter of attachments which explain alleged violation and supporting evidence.
7. *Analysis Summary.* The analysis summary should convey to the reader the overall state of health of the operator's systems analyzed.
8. *Analysis conducted by.* Enter team member's name—title and offense symbol. AQAFO/SWAP Chief will sign, date and enter distribution.

303. *DISTRIBUTION OF SWAP—REVIEW REPORT*

a. *Original* will be retained by the SWAP team.
b. *One copy* to the Chief, Flight Standards Division/Staff.
c. *One copy* to the district office chief.
d. *One copy* to AFS-300 or AFS-400 only when requested.

304. *CONTENT OF SYSTEMSWORTHINESS ANALYSIS PROGRAM—REVIEW REPORT.*

(a) *Unsatisfactory Finding.* An unsatisfactory finding is a brief factual statement made as the result of examining a group of data relating to a system which defines the defects in the operators' PROGRAM, SYSTEM, OR PROCEDURE. The findings should be broad enough to cover all the examples which support the findings.

(1) Avoid the use of words that imply an all-inclusive situation, such as: "The training programs are inadequate".
(2) Statements such as, "AJAX Airlines is in noncompliance with FAR 121.0" should not be used as a finding.

(b) *Discussion.* This section should contain all significant factors to support the fiinding such as:

(1) Facts bearing on the finding.
(2) The operator's manual procedures.
(3) Requirements of FARs.
(4) Results of interviews with operator personnel.
(5) Reference to other SWAP findings.
(6) Changes in management and supervision.
(7) Interruption of schedules, MRR.
(8) Incident, effect on safety, etc.

All of the data used should reflect sound deductive reasoning in arriving at the stated finding.

Sufficient examples should be listed to document discrepancies found in further support of the findings. They should be listed so that they will be easily identified when reviewed by the operator's personnel from their own records. They should be of such quality to support legal enforcement action if deemed necessary by the principal inspector.

(c) *Conclusion.* Conclusion and recommendations should be on a separate paper and attached to the Systemsworthiness Analysis Program—Review Report.
Formulate conclusions as to the basic causal factors of the discrepancies and the actions best suited to the case. Include effects on safety if appropriate.

(d) *Recommendations.* State (at the option of the team) recommendations designed to correct the

basic causes for deficiencies and discrepancies in the operators' program. These should be based upon appropriate analysis of all causes, proposed cures and alternative courses of action. The consequence of recommendations should be clearly stated.

(e) *Substantiating Data.* Substantiating data collected by the team will be attached to the district office copy of the Systemsworthiness Analysis Program—Review Report for their use in actions with the operator.

305. *NONDISCLOSURE TO PUBLIC.* The contents of the final SWAP reports constitute findings and recommendations made by the FAA in determining the operator's compliance with the FARs and the management systems that control his organization. Accordingly, under the exemption authorized by Section 7.65 of Part 7 of the DOT regulations, copies of SWAP reports or information therein shall not be publicly released or handled indiscriminately. Individual SWAP reports shall be considered as being "For Official Use Only" under the provisions of Order 1600.15D, and shall be marked with information "For Official Use Only" in accordance with Appendix 1, paragraph 6 of the Order. (This classification is for the COMPLETE Final SWAP report and does not prohibit transmitting the Findings and Discussion portion to the operator.)

306. *CONFIRMATION OF OPERATOR'S MEETING.* The district office chief or principal inspector will forward a letter to the operator confirming team findings, verbal agreements and discussions at the post-inspection meeting.

307. *ALLEGED NONCOMPLIANCE DATA.* The report will include sufficient evidence and/or documentation to support any alleged noncompliance. SWAP teams do not process violation reports.

a. *The evidence should be turned over* to the district office for handling.

b. *The district office is the official channel for liaison* with the operator regarding violations disclosed by SWAP. It is essential that a practical method for securing necessary copies of documents be established, by the district office, which is agreeable to the operator and fully understood by all concerned.

(1) *The contact points* within the operator's organization should be clearly identified.

(2) *If a letter of request is required* by the operator prior to releasing documents, or copies of same, such correspondence is to be initiated by the district office.

c. *Manuals/Policies/Instructions.* Manual pages, written policy or instruction which resulted in noncompliance will be IDENTIFIED only. Where such material is not readily available to the district office, copies will be made.

d. *Observed operations.* Actually observed noncompliance operations are to be supported by appropriate reports, i.e., en route, etc., and/or written statement.

e. *Frequent communications* with district office chiefs or principal inspectors regarding inspections are to be maintained. The SWAP team will promptly inform the district office inspectors regarding significant defects and/or major noncompliance areas.

308. *FEEDBACK REGARDING CORRECTIVE ACTION.*

a. *The principal inspector has the responsibility* for providing the operator with the necessary findings of the SWAP team and establishing a reasonable deadline for compliance or corrective actions.

b. *It is expected that the principal inspector* will deal with irregularities in a firm, impartial, and constructive manner, offering assistance or pro-

viding it when requested by the operator. However, responsibility for compliance and for effecting the necessary corrective action in a timely manner rests with the operator. Therefore, the emphasis should be placed on the operator's responsibility to institute and advise in writing the corrective action. The operator should submit a detailed reply that is responsive to each of the identified findings and indicate the systems procedural changes instituted. Negative responses to recommended actions should also be included.

c. *Upon receipt of the written response from the operator*, the principal inspector will determine whether the operator's actions are fully responsive to the findings of the SWAP report. If in the judgement of the principal inspector the operator's actions or proposals are unsatisfactory, he will follow up with the operator to ensure resolution of the problem areas. The principal inspector will conduct such examinations or inspections as necessary to ascertain that the corrective action stated by the operator has, in fact, been accomplished.

309. *REPORT OF CORRECTIVE ACTION (RIS: FS 8000-7).* The feedback will identify each finding in the same order as presented in the SWAP report and will clearly but briefly state the corrective action that is satisfactory to the certificate holding office. This will include:

a. *Where corrective action has been taken.*
b. *Where corrective action is not forthcoming.*
c. *Action underway or planned on open items.*
d. *Initial report of corrective action* will be submitted, normally, within 60 days following receipt of the final SWAP report, by the certificate holding office. A status report will be submitted each 30 days thereafter on all open items following initial report of corrective action.

e. *A close-out report of corrective action* will be submitted when each finding has been satisfactorily closed in the opinion of the certificate holding office.

f. *Routing of report of corrective action.* Two copies to Chief, Flight Standards Division/ Staff.

g. *The Chief, Flight Standards Division will establish* a follow-up system to insure that appropriate and timely actions are taken on reported system findings, and that these actions are evaluated by the regional staff.

310. *RETENTION OF SWAP REPORTS* is to be in accordance with instructions in the FAA Records Management Handbook, 1350.14.

311. *AVAILABILITY OF FORM.* FAA Form 8000-27, Systemsworthiness Analysis Program—Review Report (RIS: FS 8000-3), will be available on or about July 19, 1974 (an initial distribution will be made to Aeronautical Quality Assurance Field Offices (SWAP). Forms will be stocked in the FAA Depot and will be available through normal supply channels, FSN 0052-840-2000, unit of issue—sheet.

312.-399. *RESERVED.*

CHAPTER 6. SYSTEMSWORTHINESS ANALYSIS PROGRAM—MAINTENANCE/AVIONICS

SECTION 1. FAR 121/123/127 OPERATORS AND ASSOCIATED CERTIFICATED SERVICES

400. *THE FUNCTIONS TO BE ANALYZED.* For these operators the following functions will be analyzed:

a. Training.
b. Quality Control.
c. Inspection.
d. Production Control.
e. Product Improvement/Modification.
f. Maintenance Performance.
g. Performance Analysis.

401. *ANALYSIS.* A SWAP team analysis of an air carrier, travel club, or commercial operator should not require a routine SWAP team visit to the certificated facilities with which the carrier contracts unless that facility functions as the physical location of the carrier's main maintenance base. During the analysis, a nonroutine visit to a certificated contract facility may occasionally be required to further analyze a specific problem at hand. Such visits should be coordinated with the facility's certificate holding office.

402.-429. *RESERVED.*

SECTION 2. SYSTEMSWORTHINESS ANALYSIS PROGRAM— MAINTENANCE/AVIONICS— GENERAL AVIATION

430. *AIR TAXI OPERATORS AND COMMERCIAL OPERATORS OF SMALL AIRCRAFT (FAR 135).* The functions to be analyzed for these operators are as follows:

a. Policies and procedures.
b. Quality control.
c. Facilities and equipment.
d. Personnel and training.
e. Maintenance performance.

431. *AIR TAXI OPERATORS OF LARGE AIRCRAFT.* The instructions and guidance material contained in Section 1 of this chapter will apply to Air Taxi/Commercial Operators of large aircraft certificated under the provisions of FAR 135.2.

432. *REPAIR STATIONS (FAR 145).* The functions to be analyzed for these operators are as follows:

a. The certificate and ratings.
b. Quality control.
c. Maintenance performance.
d. Facilities and equipment.
e. Personnel and training.

433. *MAINTENANCE TECHNICIAN SCHOOLS (FAR 147).* The functions to be analyzed for these operators are as follows:

a. The curriculum.
b. Equipment and facilities (classrooms and shops).
c. Instructor qualifications.
d. Student instructor ratio.
e. Instructional aids.

434. *PILOT TRAINING SCHOOLS (FAR 141).* The functions to be analyzed for these operators are as follows:

a. Policies and procedures.
b. Quality Control.
c. Facilities and equipment.
d. Personnel and training.

435.-499. *RESERVED.*

CHAPTER 7. SYSTEMSWORTHINESS ANALYSIS PROGRAM—OPERATIONS

500. *FAR 121/123/127/135.2 OPERATORS AND ASSOCIATED CERTIFICATED FACILITIES.* The functions to be analyzed for these operators are as follows:

a. Records and Crew Scheduling.
b. Facilities.
c. Flight Operations Policies and Procedures.
d. Ground Station Personnel Training.
e. Handling of hazardous material.

501. *GENERAL AVIATION OPERATIONS.*

a. *Air Taxi/Commercial Operators.* The functions to be analyzed for those operators are as follows:

1. Pilot training program.
2. Flight attendant training program.
3. Flight operations polices and procedures.
4. Handling of hazardous material.

b. *Pilot Training School.* The functions to be analyzed for these operators are as follows:

1. School management.
2. Quality of instruction.
3. Personnel and training.
4. Aircraft and equipment.

502.-559. *RESERVED.*

GLOSSARY OF TERMS

A. *SWAP COMMON SYSTEMS*

(1) *SYSTEM*—An array of related major subsystems and elements designed to work in unison and harmony towards a predetermined objective and ultimate goal. Seven constant components of all good systems are policy formulation, organization, standards of performance, individual analysis, help and information needed, sources of help and information needed, and time schedules. An additional component is control.

(2) *SYSTEMSWORTHINESS ANALYSIS PROGRAM (SWAP)*—A process of breaking a system down into its subsystems and elements and applying the seven constant components for the purpose of assessing and reporting the worth of each component as it affects the subsystem and subsequently the entire system.

(3) *SUBSYSTEM*—A major component of an entire system such as a procedure. A subpart of a system that is an integral part of a larger system.

(4) *ELEMENT OF A SYSTEM OR SUBSYSTEM*—An essential resource such as money, manpower, machines, equipment, tools, space, material supplies, training, safety precautions, utilities, morale or other items of need essential to the suitable functioning of a system or subsystem.

(5) *ANALYSIS*—A series of processes or techniques used in breaking a system down into its components and elements to aid in the process of measuring the worth and value of each com-

ponent and element comprising the system. Analysis is a penetrating inquiry into the nature of things as to effect and cause relationships to aid the decision maker in making a choice between possible alternatives and consequences.

B. *SEVEN CONSTANT COMPONENTS OF ALL GOOD SYSTEMS*

(1) *POLICY FORMULATION*—Statements of intent.

(a) *GENERAL POLICIES*—Statements of ultimate purpose.
(b) *MAJOR POLICIES*—Statements of Intermediate objectives, quantifiable, qualitative, and timeliness.
(c) *DEPARTMENTAL POLICIES*—Methods and procedures for achieving objective.

(2) *ORGANIZING*—Process of dividing the work to be done to reach the objective sought. Assigning and limiting responsibility and authority, establishing working relationships channels for coordination and cooperation.

(3) *STANDARDS OF PERFORMANCE*—Results expected from organizational elements, persons or items. Reasonable and attainable results expected from persons, items or things.

(4) *INDIVIDUAL ANALYSIS*—Profiling position requirements, profiling of man specification, matching the two profiles and determining a course of action.

(5) *HELP AND INFORMATION NEEDED*—Tools, machines, equipment, supplies, etc., and training individuals in their use, guidelines, directives, and the like.

(6) *SOURCES OF HELP AND INFORMATION*—Policy, organization and procedure manuals. Specifications, blue prints, regulations, laws, reports, publications, texts, etc., and training centers.

(7) *TIME SCHEDULES*—Target dates, deadlines, time controls compatible with quantity and quality desired.

C. *DEFINITIONS.*

PRINCIPAL—A fundamental truth, FAR, a rule of thumb, guiding belief, a common practice a conventional way.

PROCESS CHART—A method for breaking a compound procedure down into its sequential steps. A detailed record of the successive steps in an activity or process. It sets down in chronological order everything that is done.

BEFORE STUDY—A process chart showing a process or procedure as it is currently being done.

AFTER STUDY—A process chart showing a proposal for modifying a current process.

SIGNIFICANT—Having possible effect on safety or compliance with applicable rules.

SURVEILLANCE—A continuing and intermittent inspection of a system or combination of systems and procedures. A reconnaissance survey, a close watch over events and trends to insure compliance with norm, regulation or standard practice(s).

APPRAISAL—An analysis of the worth or values of a system, item or thing. A surfacing of defects, a penetrating comparison of what-is with what-ought-to-be.

STANDARD—A device for measuring something, a result expected, a norm established by common practice, a description of what ought to be, a reasonably attainable objective or goal, a measure of quantity, quality and timeliness.

PROCEDURE—A process, routine, or prescribed sequence of steps or tasks to produce a desired result.

INSPECTION—A purposeful observation of an event, a document item or thing to closely examine quantity, quality or timeliness, compliance with reg-

ulation, norm, good standard practice, and safety. A close look at the performance of people and things.

EFFICIENCY PRINCIPLES IN ANALYSIS—An analytical technique using proven fundamental truths to aid the analyst or decision makers isolate defective areas, and provide clues for recommending choices from among proven alternative courses of action.

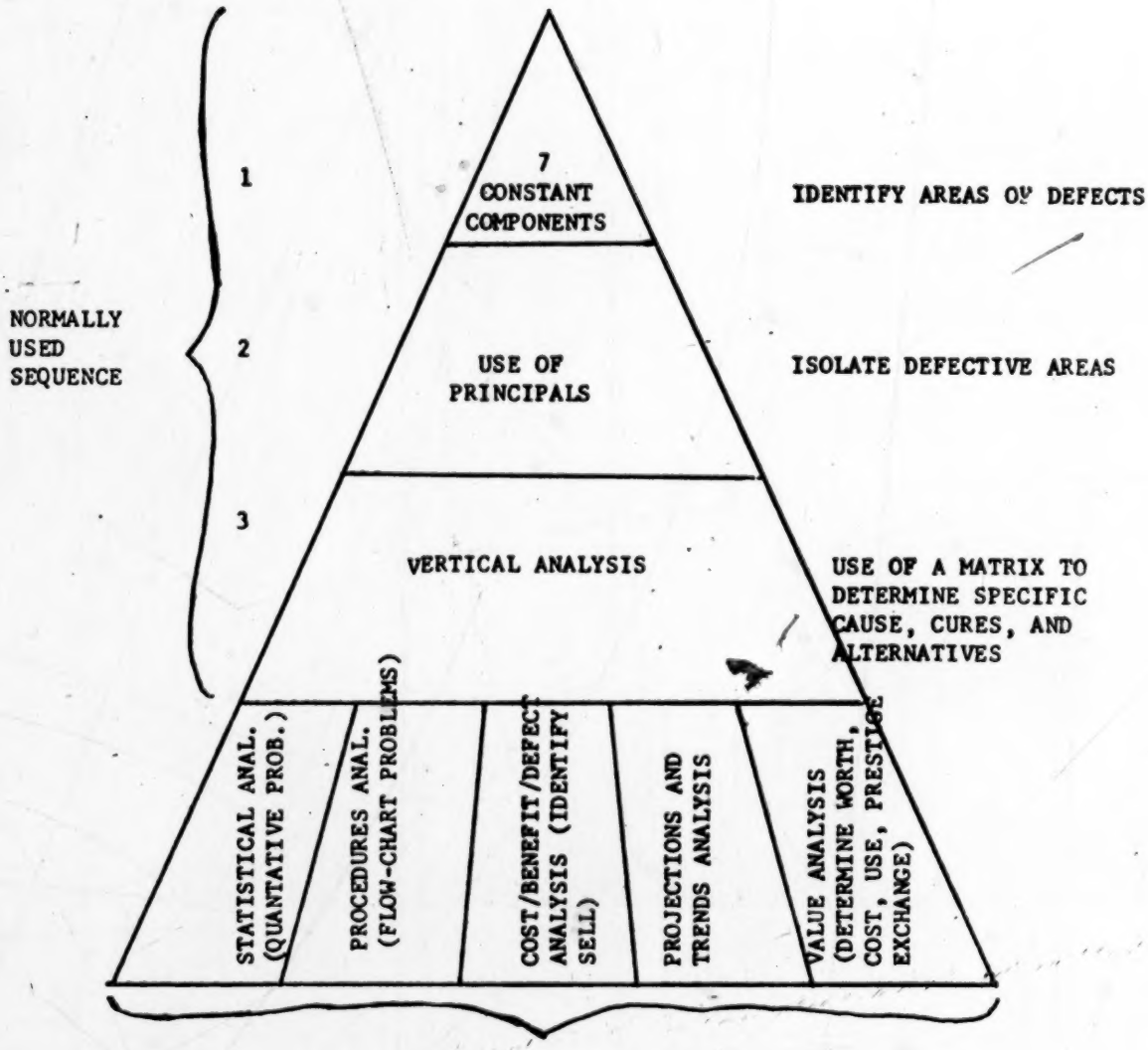
VERTICAL ANALYSIS—An analytical technique designed to aid the analyst or decision maker organize his thinking, diagnose a situation, reduce general situations to specific problems, eliminate triva, clearly associate effect with cause and relate cure to cause, avoid treating symptoms rather than cause, and prepare preliminary reports.

STATISTICAL ANALYSIS—An analytical technique designed to aid an analyst or decision maker analyze quantitative data past, current and future; draw conclusions and inferences, project trends, and choose alternatives based on quantitative values.

COST/BENEFIT/EFFECTIVENESS ANALYSIS—An analytical technique designed to aid the decision maker, analyze, compare, and weight the consequences of alternative courses of action against each other. A technique to aid in the process of persuasion.

VALUE ANALYSIS—An analytical technique designed to aid the decision maker make a best choice of alternative intangible values for improved effectiveness of resources.

FIGURE 1. HOW TO APPROACH SYSTEMS ANALYSIS



D. *NORMAL PROCESS OF SYSTEMS INSPECTION AND ANALYSIS (FIGURE 1)*

1. Observe, using the 7 constant components to identify apparent problem areas.
2. Observe, using the principles to break the problem areas down further.
3. Observe, using the vertical analysis technique to further reduce the problem areas to more specific defects, causes and cures.
4. As determined by step 3, select the most suitable analytical or procedural technique to pinpoint the specific problem.
5. As determined by steps 3 and 4, use cost/benefit/effectiveness analysis to choose between alternatives available which reflect objective data.
6. As determined by 3, 4 and 5 use value analysis on subjective data.

All or any of the techniques will aid in selling the teams' findings.

* APPENDIX 2. SAMPLE FAA FORM 8000-27, SYSTEMSWORTHINESS ANALYSIS PROGRAM - REVIEW REPORT

SYSTEMSWORTHINESS ANALYSIS PROGRAM – REVIEW REPORT | RIS: FS 8000-3

1. NAME OF OPERATOR & LOCATION
XYZ Airlines, Incorporated
Oneida County Airport
Oriskany, N.Y. 00000

2. A. TYPE OPERATION
Scheduled Air Carrier

B. APPLICABLE FAR
121

3. INSPECTION
[X] REGULAR
[ ] SPECIAL
REQUESTED BY

4. DATES ANALYSIS CONDUCTED
A. FROM 5/27/74
B. TO 6/12/74

5. FUNCTIONS ANALYZED

	FUNCTIONS (List functions analyzed)	RESULTS: SATISFACTORY ("X" if applicable)	RESULTS: UNSATISFACTORY (List serial attachment no(s).)
a	Quality Assurance		1, 3, 7, 9
b	Personnel and Training	X	
c	Equipment and Facilities		2, 4, 6
d			
e			
f			
g			
h			
i			
j			

6. ALLEGED FAR NONCOMPLIANCE

	FUNCTION	FAR	(List serial attachment number(s) plus evidence)
a	Airworthiness Directives	39.3	10, 11
b			
c			
d			
e			
f			

REPORT DISTRIBUTION	ORIGINAL SWAP TEAM	1 Copy Chief, FS Div./Staff [X]	1 Copy Chief, Dist. Ofc. [X]	1 Copy A/C Maint. Rpt. AFS-300	1 Copy When Requested to WASH HQ	[ ] G/A Maint. Rpt. [ ] G/A Ops. Rpt. [ ] A/C Ops. Rpt.

FAA Form 8000-27 (5-74)

FOR OFFICIAL USE ONLY
(Public availability to be determined under 5 U.S.C. 552)

Typical Execution of Front of FAA Form 8000-27 (5-74), Systemsworthiness Analysis Program - Review Report

7. ANALYSIS SUMMARY
(BRIEF SUMMARY OF OPERATOR'S STATUS)

8. ANALYSIS CONDUCTED BY		
TYPED NAME & SIGNATURE	TITLE	OFFICE SYMBOL
R. Schiller	Team Leader	AEA-260
T. Smith	Air Carrier Maint. Specialist	AEA-260
J. Jones	Air Carrier Maint. Specialist	AEA-260

AQAFO/BWAP CHIEF		
TYPED NAME & SIGNATURE	TITLE & ORGANIZATION	DATE
W. Russell	Chief, Aeronautical Quality Assurance Field Office	6/17/74

Typical Execution of Back of FAA Form 8000-27, Systemsworthiness Analysis Program - Review Report

[CHANGE] [8000.3C CHG 4]

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

10/15/74
Cancellation
Date: after
filing

SUBJ: SYSTEMSWORTHINESS ANALYSIS PROGRAM

1. *PURPOSE.* This change provides information designed to prevent duplication of effort by SWAP and QASAR teams.

2. *EXPLANATION.* This change eliminates duplication of inspection effort, thus saving valuable time and money.

PAGE CONTROL CHART

Remove pages	dated	Insert pages	dated
iii	7/24/74	iii	10/15/74
iv	7/24/74	iv	7/24/74
103 and 104 (thru 150)	12/11/73	103	12/11/73
		104 (thru 150)	10/15/74

/s/ C. R. Melugin, Jr.
C. R. MELUGIN, JR.
Acting Director, Flight Standards Service

Distribution: WRCMFS-3; FFS-1, 2, 3, 5, 7, 8 (wide); FIA-0 (minimum); AAC-955 (80 copies)

Initiated By: AFS-340

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h. Any other factors that could adversely affect the operators' performance or be of assistance to the teams.

i. That portion of the district office program SWAP will accomplish.

104. *OTHER BRIEFINGS.* The inspection team will have free access to manuals, correspondence, and records pertaining to the operator, and any other appropriate data maintained by district offices. All material and data pertinent to the inspection will be studied by the team to acquaint them with the operator's policies, instructions and procedures. It is essential that the team has a good working knowledge of the operator's management policies and procedures applicable to the area to be investigated before they meet with the operator. In this manner, the team will be better equipped to discuss intelligently the policies and procedures used by the operator in the direction and control of his enterprise.

105. *INITIAL MEETING WITH THE OPERATORS.*

a. *The district office chief or principal inspector shall arrange* for and chair the initial meeting of the inspection team and the operator. He will explain the purpose and scope of the inspection. In cases where a problem area is suspected to exist, it should be frankly discussed with the operator. This straight-forward approach will help to foster a feeling of mutual trust and respect that is beneficial, if not essential, to the analysis. At this time, the operator will be advised that he will be informed of the team's findings at a meeting to be arranged by the district office at the conclusion of the inspection. The operator should be invited to stipulate any special areas that he would like the team to examine.

b. *At the initial meeting of SWAP and the operator,* the team leader will furnish the operator a written itinerary of the SWAP team includ-

ing dates that facilities, subcontractors, suppliers, etc., will be visited. The operator should be advised that it will be his responsibility to advise the areas of the intended visits. This procedure will not apply to en routes, pilot proficiency checks or airman certification functions.

c. *The operator should also* be advised that experience has shown that rumors relating to FAA findings while the inspection is in progress are not unusual and should be disregarded. Such rumors usually stem from the searching nature of the questions posed by members of the team. Team members will normally not discuss findings with the operator's personnel during the onsite inspection.

106. *DISTRICT OFFICE CHIEF OR PRINCIPAL INSPECTOR DEBRIEFING.* The Systemsworthiness Analysis team will debrief the district office at the conclusion of their inspection. At this meeting all findings will be discussed prior to meeting with the operator, thereby preparing the agency spokesman for the post-inspection meeting with the operator. At this time, the team will also furnish the district office with copies of appropriate FAA forms covering that portion of the district office work program accomplished by the team.

107. *POST-INSPECTION MEETING WITH THE OPERATOR.* The district office chief or the principal inspector shall arrange for, and serve as agency spokesman in the post-inspection meeting with the operator. All findings discussed at the meeting must be fully supported by facts acquired by the team. However, the operator should be given ample opportunity to present additional facts which he feels mitigate defects found by the inspection team.

108. *ELIMINATING DUPLICATION OF EFFORT BY SWAP AND QASAR TEAMS.* When a manufacturer holds a repair station certificate, with limited rating for manufacturers (MMF), the SWAP unit

will not schedule an inspection until the QASAR unit has been consulted. If it is learned that considerable activity has transpired under the terms of the repair station certificate, SWAP will consider the previous findings of QASAR and make a decision on conducting a SWAP inspection of the repair station activity only. For the most part, only one inspection will be required (QASAR). There will be exceptions where a SWAP inspection will be conducted if considerable activity is continuing under the repair station certificate.

109-199. *RESERVED.*

SUPREME COURT OF THE UNITED STATES

No. 74-450

ALEXANDER P. BUTTERFIELD, Administrator,
Federal Aviation Administration, et al., PETITIONERS

v.

REUBEN B. ROBERTSON, III, et al.

ORDER ALLOWING CERTIORARI—Filed December 16, 1974.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 567221 95

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No.

ALEXANDER P. BUTTERFIELD, ADMINISTRATOR OF THE FEDERAL AVIATION ADMINISTRATION, ET AL., PETITIONERS

v.

REUBEN B. ROBERTSON, III AND JEROME B. SIMANDLE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Administrator of the Federal Aviation Administration, the Federal Aviation Administration, the Secretary of Transportation, and the Department of Transportation, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1A–16A) is reported at 498 F. 2d 1031. The order of the district court (App. C, *infra*, pp. 19A–20A) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra,* pp. 17A–18A) was entered on May 9, 1974. A timely petition for rehearing was denied on July 11, 1974 (App. D, *infra,* p. 21A). On October 4, 1974, the Chief Justice extended the time to petition for a writ of certiorari to October 19, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Exemption 3 of the Freedom of Information Act provides for nondisclosure of "matters that are specifically exempted from disclosure by statute." The question is whether this exemption covers all material with respect to which Congress by statute has provided for nondisclosure upon various terms, including statutes that give government officials discretion to decide whether to disclose.

STATUTES INVOLVED

Section 1104 of the Federal Aviation Act of 1958, 49 U.S.C. 1504, provides:

> Any person may make written objection to the public disclosure of information contained in any application, report, or document filed pursuant to the provisions of this chapter or of information obtained by the Board or the Administrator, pursuant to the provisions of this chapter, stating the grounds for such objection. Whenever such objection is made, the Board or Administrator shall order such information withheld from public disclosure when, in their judgment, a disclosure of such information would adversely affect the interests of

such person and is not required in the interest of the public. The Board or Administrator shall be responsible for classified information in accordance with appropriate law: *Provided,* That nothing in this section shall authorize the withholding of information by the Board or Administrator from the duly authorized committees of the Congress.

The Freedom of Information Act, 5 U.S.C. 552, provides in pertinent part:

§ 552. *Public information; agency rules, opinions, orders, records, and proceedings.*

(a) Each agency shall make available to the public information as follows:

* * * * *

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uni-

formed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

* * * * *

(b) This section does not apply to matters that are——

* * * * *

(3) specifically exempted from disclosure by statute;

* * * * *

STATEMENT

In this suit the plaintiffs seek, under the Freedom of Information Act (FOI Act), 5 U.S.C. 552, reports prepared by the Federal Aviation Administration (FAA) in connection with its Systemsworthiness Analysis Program (SWAP). This program, which supplements the FAA's ordinary surveillance of airlines, consists of in-depth studies by FAA investigative teams of broad areas of airlines' operations and is intended to prevent unsafe conditions from arising.[1]

[1] The current FAA SWAP handbook defines the program as follows:

"The Flight Standards Systemsworthiness Analysis Program is a systems approach to fulfill agency responsibilities for inspection and surveillance of operators having formalized systems that cannot be monitored effectively using customary surveillance techniques. It is aimed at determining the causal factors which allow a system to deteriorate rather than the symptoms that are a result of such deterioration. The task of the SWAP team is to supplement the process of surveillance

As the affidavit of the former Federal Aviation Administrator in this case stated, the "investigative team works in close cooperation with airline management to find any area of maintenance, operations, management, or overall performance which needs improvement" and, thus, "[t]he system depends upon the frank and full disclosure of the airline" (C.A. App. 44).[2]

As a result of a SWAP investigation, a report is compiled for the use of FAA officials, setting out the team's findings, discussions, comments, and recommendations concerning the systems inspected. "Information investigated and discussed in a SWAP inspection," according to the former Administrator, "includes financial and operational matters which would not customarily be released to the public," as well as material "which would not be disclosed to competitors" (C.A. App. 44). The SWAP program, therefore, "operates with the understanding between the airlines and the FAA that the information will not be disclosed to the public" (C.A. App. 45).

After plaintiffs had requested the SWAP reports from the FAA, the Air Transport Association, on behalf of 28 airlines, wrote to the FAA (C.A. App. 100–102) asking that the reports be withheld from disclosure pursuant to Section 1104 of the Federal Aviation Act, 49 U.S.C. 1504. Section 1104 (*supra,*

with an indepth analysis of operators' systems and subsystems to determine if system objectives are being achieved." FAA Order 8000.3C, p. 1.

[2] "C.A. App." refers to the appendix in the court of appeals, a copy of which we are lodging with the Clerk.

pp. 2–3) provides that the Federal Aviation Administrator and the Civil Aeronautics Board, upon written objection to the disclosure of information obtained pursuant to the Act, may withhold such information "when, in their judgment, a disclosure of such information would adversely affect the interests of such person and is not required in the interest of the public."

In objecting to disclosure of the SWAP reports, the Air Transport Association noted that "[i]nformation freely given to the FAA SWAP team by the air carrier management personnel is not specifically required by the [Federal Aviation Regulations]" and that "[t]he present practice of non-public submissions * * * encourages a spirit of openness on the part of airline management which is vital to the promotion of aviation safety." The letter concluded that "[i]f public disclosure of the SWAP reports were made, the interests of aviation safety would be in danger of being subordinated to some degree to legal considerations in the presentation of information to the FAA" (C.A. App. 100). Acting upon this objection, the Administrator in the exercise of his authority under Section 1104, determined that the SWAP reports should be withheld from public disclosure since the "disclosure of the information contained therein would adversely affect the interests of the airline being investigated and is not required in the interest of the public" (C.A. App. 103).

The FAA advised respondents of the Administrator's determination under Section 1104, explaining that the SWAP reports were therefore "matters that

are specifically exempted from disclosure by statute" under exemption 3 of the FOI Act, 5 U.S.C. 552(b)(3) (C.A. App. 36). The FAA further stated that the reports were exempted from disclosure under exemptions 4, 5 and 7 of the Act, 5 U.S.C. 552(b)(4), (5) and (7) (C.A. App. 36–38).

In the district court the FAA renewed its contention that, *inter alia,* the SWAP reports were exempted from disclosure under exemption 3 of the FOI Act by virtue of Section 1104.[3] The district court held, however, that the SWAP reports were "public and non-exempt" (App. C, *infra,* p. 20A).[4]

On appeal, the court of appeals, in a 2–1 decision, held that the SWAP reports were not exempt pursuant to exemption 3 and remanded the case for consideration of other exemptions the FAA may wish to assert (App. A, *infra,* pp. 1A–16A). The court stated that "[t]he ordinary meaning of the language of Exemption (3) is that the statute therein referred to must itself specify the documents or categories of documents it authorizes to be withheld from public scrutiny," and that "Section 1104 of the Aviation Act fails to do this" (App. A. *infra,* p. 4A). The court

[3] The FAA also relied upon Exemptions 4, 5 and 7 of the FOI Act, 5 U.S.C. 552(b)(4), (5) and (7).

[4] Respondents also sought disclosure of Mechanical Reliability Reports (MRRs). MRRs are daily reports of mechanical malfunctions which are submitted to the FAA by aircraft operators. While he had previously declined to disclose MRRs, on January 11, 1972, the Administrator determined to permit disclosure of MRRs received after February 18, 1972. The district court's subsequent order in this case, on November 8, 1972, ordered disclosure of MRRs received prior to February 18, 1972. Petitioners did not contest this aspect of the district court's order on appeal.

concluded that since the SWAP reports "did not fall within any congressionally specified statutory category * * * [i]t would be unacceptable to hold that [the Administrator's] conclusion that disclosure of any and all of the reports requested would adversely affect the interests of each airline covered, and is not required 'in the interest of the public,' is a specific exemption by section 1104" (App. A, *infra,* pp. 4A–5A).

The court, noting that Section 1104 of the Federal Aviation Act contains a "public interest" standard, stated that the subsequently enacted FOI Act provided "the guide to the congressional intent with respect to the public interest" (App. A, *infra,* p. 11A). Because the FOI Act intended to eliminate from the Public Information Section of the Administrative Procedure Act such guidelines as "in the public interest," the court concluded that "the public interest standard of section 1104 is not a specific exemption by statute within the meaning of Exemption (3)" (App. A, *infra,* pp. 9A, 11A–12A).

Judge Robb dissented. He cited legislative history explaining that exemption 3 was designed to assure that the numerous previously enacted nondisclosure statutes would not be modified by the Freedom of Information Act. He concluded that "Section 1104 is tailored to the needs and problems of the Federal Aviation Administration" and was not "overridden or repealed by the general terms of the Freedom of Information Act" (App. A, *infra,* p. 16A).

REASONS FOR GRANTING THE WRIT

1. This case presents an important and recurring question concerning the meaning of exemption 3 to the Freedom of Information Act. That exemption excepts from the Act's disclosure requirements "matters that are specifically exempted from disclosure by statute." The question is whether, as the government contends, exemption 3 is applicable whenever, in refusing to disclose material, the government acts pursuant to a statute that provides for or permits nondisclosure. The court of appeals rejected this interpretation. It determined the applicability of the exemption on the basis of its judgment whether recognizing the confidentiality provided in the particular statute involved would further the objectives of the FOI Act.

At the time of the enactment of the FOI Act, there were nearly 100 statutes in existence which restricted disclosure in various ways. Those statutes, most of which have not been expressly repealed, provide for either mandatory[5] or discretionary nondisclosure of information. Note, *Freedom of Information: The Statute and the Regulations,* 56 Geo. L. J. 18, 33–34 (1967). The discretionary statutes differ widely and range from those, like 42 U.S.C. 1306,[6] which provide

[5] An example of a mandatory nondisclosure statute is 22 U.S.C. 987, which provides that correspondence and records of the State Department relating to the officers and employees of the Foreign Service are confidential and subject to inspection only by certain specified government officers.

[6] 42 U.S.C. 1306(a) provides in pertinent part:

"No disclosure of any * * * report * * * obtained at any time by the Secretary of Health, Education, and Welfare * * * or by any officer or employee of the Department * * * in the

for the nondisclosure of information unless government officials authorize disclosure, to those, like Section 1104, which permit disclosure unless government officials determine that the material should be kept confidential. They also vary with respect to the specificity of both the description of the material to be kept confidential and the basis upon which government officials may disclose it.[7]

As we show below, Congress was aware of these nondisclosure provisions and, by enacting exemption 3, intended to preserve all of the statutes, regardless of their terms, which specifically provided for nondisclosure of information. The court of appeals' decision in this case defeats that congressional policy. Instead of ascertaining whether, in refusing to disclose the SWAP reports, the Administrator acted pursuant to

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course of discharging their respective duties under this chapter * * * shall be made except as the Secretary * * * may by regulations prescribe."

[7] For example, 26 U.S.C. 6104(a)(1)(B) provides that the Secretary of the Treasury or his delegate, with respect to applications and supporting documents filed by tax exempt organizations, is to withhold from public inspection upon request of the organization any information "which he determines relates to any trade secret, patent, process, style of work, or apparatus, of the organization, if he determines that public disclosure of such information would adversely affect the organization."

35 U.S.C. 122 provides that information in patent applications cannot be made public by the Patent Office "unless necessary to carry out the provisions of any Act of Congress or in such special circumstances as may be determined by the Commissioner."

38 U.S.C. 3301 states that all files, records, reports and other papers pertaining to any claim under any law administered by the Veterans Administration is not to be disclosed except that "[t]he Administrator may release information * * * when in his judgment such release would serve a useful purpose."

a statute providing for such nondisclosure, the court of appeals undertook itself to decide whether maintaining the confidentiality of the SWAP reports, as provided in Section 1104, would further the general goals of the FOI Act.

Congress, however, did not intend the courts, in determining the applicability of exemption 3, to make such an inquiry. Rather, they are to determine only whether, apart from the FOI Act, there is a statute authorizing nondisclosure.

The approach of the court of appeals in interpreting exemption 3 in this case places in jeopardy a large number of the nondisclosure statutes that Congress intended to continue in effect when it enacted exemption 3. Since the Freedom of Information Act permits suits to compel disclosure to be brought in the district "in which the agency records are situated" (5 U.S.C. 552(a)(3)), the presence in the District of Columbia of most government agencies means that this decision is likely to have a particularly significant impact upon the administration of the Freedom of Information Act. It warrants review by this Court.

2. Neither the language nor the legislative history of exemption 3 supports the court of appeals' construction of it.

a. Exemption 3 covers "matters that are specifically exempted from disclosure by statute." Nothing in that phrase indicates or suggests that the statute which "specifically exempt[s]" matters from disclosure must either specify the particular documents thus exempted or provide for disclosure on terms that further the objectives of the FOI Act.

To the contrary, the statute in terms requires only that nondisclosure be specifically authorized by the statute, in contrast to situations where it is merely implied from the legislation or where government officials without specific statutory authority nevertheless refuse to disclose on the basis of their judgment that disclosure would be inappropriate.

Section 1104 of the Federal Aviation Act is a statute that "specifically exempt[s]" from disclosure the matters it covers. It provides that when the Civil Aeronautics Board or the Federal Aviation Administrator concludes that disclosure of information contained in any documents obtained by them under the Federal Aviation Act would adversely affect the interests of a person seeking confidential treatment "and is not required in the interest of the public," the Board or Administrator "shall order such information withheld from public disclosure." Congress has thus made the judgment that, in cases where the Board or the Administrator decides that the public interest requires that information obtained by them not be made public, the material shall be kept confidential. That is precisely the situation in which Congress intended exemption 3 to be applicable.

The court of appeals' ruling that exemption 3 covers only exemptive statutes that themselves specify the documents to be kept confidential is inconsistent with this Court's interpretation of another similarly structured exemption to the Act in *Environmental Protection Agency* v. *Mink*, 410 U.S. 73. That case involved exemption 1, which exempts from disclosure matters "specifically required by Executive order to

be kept secret in the interest of the national defense or foreign policy." 5 U.S.C. 552(b)(1). The Executive Order involved in *Mink*, No. 10501, did not refer, "specifically" or otherwise, to the six documents at issue in that case. Rather that Executive Order, like Section 1104 of the Federal Aviation Act, provided for confidential treatment of materials that had been classified by others. 410 U.S. at 82, n. 8. This Court rejected the argument that "classification of material under Executive Order 10501 is somehow insufficient for Exemption 1 purposes, or that the exemption contemplates the issuance of orders, under some other authority, for each document the Executive may want protected from disclosure under the Act" (410 U.S. at 83). Similarly, there is nothing in exemption 3 that limits its coverage to statutes that "specify the documents or categories of documents it authorizes to be withheld from public scrutiny" (App. A, *infra*, p. 4A).*

b. The legislative history of exemption 3 shows that the purpose of the exemption was to continue the effectiveness of the numerous statutes Congress previously had enacted to provide for confidential treatment of material in the government's possession.

In explaining exemption 3, the 1966 House Report stated that there are "nearly 100 statutes or parts of statutes which restrict public access to specific Gov-

* Mr. Justice Stewart noted in *Mink* that Exemption 3 is "[s]imilarly rigid" to exemption 1 and that "the only "matter" to be determined in a district court's *de novo* inquiry [under exemption 3] is the factual existence of * * * a statute, regardless of how unwise, self-protective, or inadvertent the enactment might be" (410 U.S. at 95, note).

ernment records. These would not be modified by the public records provision of S. 1160."[*] H. Rep. No. 1497, 89th Cong., 2d Sess., p. 10. This interpretation of the exemption was in accord with numerous prior expressions of congressional intent, made during the legislative consideration of the predecessor bills to the statute actually enacted, to preserve previously enacted nondisclosure statutes.

Thus, during the 1963 Senate Hearings, Senator Long, the Chairman of the Senate Subcommittee, and a leading proponent of the FOI Act, stated (Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, on S. 1666 and S. 1663 (in part) (Freedom of Information), 88th Cong., 1st Sess., p. 6):

> Section 3(e) of S. 1666 states that nothing in this section authorizes the withholding of information nor the limiting of public access to records except as specifically described in the measure. * * * *Statutes which curtail the availability of information to the public are not intended to be affected by the enactment of this bill.* They provide that specified records shall not be released unless authorized by law. Subsection 3(e) is not such an authorization to disclosure. It should be made clear that *this bill in no way limits statutes specifically written with the congressional intent of curtailing the flow of information* as a supplement necessary to the proper functioning of certain agencies. [Emphasis added.]

[*] S. 1160 is the Senate Bill which was enacted into law as the FOI Act.

During the 1965 hearings before the Foreign Operations and Government Information Subcommittee of the House Government Operations Committee, Congressman Moss, the Chairman of the Subcommittee and a leading proponent of the FOI Act, stated that the FOI Act would provide for the availability of information "unless it is withheld * * * by some statutory authority given by the Congress." Hearings before a Subcommittee of the House Committee on Government Operations, on H.R. 5012, *et al.* (Federal Public Records Law (Part 1)), 89th Cong., 1st Sess., p. 14. He noted that nondisclosure would be permissible under the FOI Act for matters "covered by specific statute" and that there were "some 78 statutes which confer authority for withholding of information" (*id.* at 20, 53).

Section 1104 is one of the pre-existing statutes governing nondisclosure which Congress did not intend exemption 3 to disturb. It is a statute in which Congress specifically directed the Administrator not to disclose material he has obtained under the Federal Aviation Act when disclosure would not be required in the public interest. Any doubt on that score is dispelled by the fact that an exhibit submitted during the Hearing before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, on Freedom of Information and Secrecy in Government conducted in 1958, 85th Cong., 2d Sess., listed Section 1104 as one of the "Statutory Provisions Restricting Disclosure of Government Information" (Section 1104 was then 49 U.S.C. 674) (pp. 985–987, 1017).

3. The failure of the courts of appeals to recognize that in applying exemption 3 their function is to determine only whether there is a statute requiring or authorizing the confidentiality of the material involved has led to uncertainty and confusion among the circuits over the standards for applying that exemption.[10]

In *Stretch* v. *Weinberger*, 495 F. 2d 639, the Court of Appeals for the Third Circuit ruled that for a statute providing for confidentiality to be within exemption 3, it must "prescribe some basis upon which the [agency] is to decide" whether to disclose material, namely, it must prescribe "standards or guides through which legislative judgment would be reflected in the making of administrative exemptions" (495 F. 2d at 640). It held that exemption 3 does not apply to documents covered by 42 U.S.C. 1306(a) (*supra*, n. 6), which itself provides no guidelines governing the Secretary of Health, Education, and Welfare's action in making public certain reports

[10] The court of appeals in this case was of the view that one of the deficiencies of Section 1104 was that it does not provide for judicial review of a determination of nondisclosure. There is nothing in the language or legislative history of exemption 3, however, that suggests that the lack of judicial review of an administrative determination of confidentiality defeats the exemption of material that is "specifically exempted from disclosure by statute." Moreover, an order of nondisclosure by the Administrator or the Civil Aeronautics Board is judicially reviewable under 49 U.S.C. 1486.

The court of appeals in this case also distinguished other nondisclosure statutes listed in the Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act on such grounds as having a "built-in time limit" and granting "very little discretion" (App. A, *infra*, pp. 6A–7A). There is no basis in exemption 3 for such distinctions.

filed with him. Under that standard, the Third Circuit is likely to hold that exemption 3 covers the documents involved in the present case, since the touchstone for disclosure under Section 1104—whether the "disclosure of such information would adversely affect the interests of such person and is not required in the interest of the public"—provides sufficient guidelines.

The Court of Appeals for the Fourth Circuit seemingly so indicated in *Sears* v. *Gottschalk*, No. 73-1699, decided August 14, 1974 (App. E, *infra*, pp. 23A–42A). There, in discussing *Evans* v. *Department of Transportation*, *infra*, it pointed out that in Section 1104 "Congress had provided some standards for the exercise of discretion" (App. E, *infra*, p. 29A). In contrast, even though the Court of Appeals for the District of Columbia has expressed agreement with the reasoning of the Third Circuit in the *Stretch* case,[11] it has nonetheless found exemption 3 inapplicable to Section 1104.

In view of this disagreement and uncertainty among the circuits, there is bound to be further confusion and additional litigation over the meaning of exemption 3 unless this Court clarifies the issue.

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[11] *Schechter* v. *Weinberger*, No. 73-1797, decided October 3, 1974, another case involving 42 U.S.C. 1306(a). Judge MacKinnon dissented in *Schechter* on the ground that Congress was "well aware of the existence of statutes such as 1306" and that "[i]f Congress had not intended to include this statute within Exemption Three, it could easily have done so either by explicitly narrowing the coverage of the exemption or by amending Section 1306" (498 F. 2d. 1015, 1016). In *Serchuk* v. *Weinberger*, 493 F. 2d 663, the Court of Appeals for the Fifth Circuit held without opinion, citing *Stretch* v. *Weinberger*, *supra*, that Section 1306(a) was not within exemption 3.

4. In *Evans* v. *Department of Transportation,* 446 F. 2d 821 (C.A. 5), certiorari denied, 405 U.S. 918, the Federal Aviation Administration received a letter describing Evans' alleged mental disorders affecting his qualification as a commercial pilot, but not identifying Evans by name. The correspondent refused to name Evans until he had been assured in writing that his letter would be kept confidential. 446 F. 2d at 823. The Court of Appeals for the Fifth Circuit, as an alternative ground for holding that Evans could not obtain the letters under the Freedom of Information Act, ruled that exemption 3 covered the letters. Noting that exemption 3 covers "matters that are specifically exempted from disclosure by statute," it ruled that, since the identity of Evans had been given under "assurances of complete non-disclosure," Section 1104 covered the situation. Since the SWAP program involved in the present case similarly "operates with the understanding between the airlines and the FAA that the information will not be disclosed to the public" (C.A. App. 45), the Fifth Circuit apparently would treat as confidential the material that the District of Columbia Circuit in the present case ordered produced. Indeed, in *Evans,* the Fifth Circuit seemingly—and correctly—viewed its role in determining whether exemption 3 applied as limited to ascertaining whether there was a statute providing for confidential treatment; since Section 1104 was such a statute, that ended the inquiry.

The decision of the court of appeals in the present case has in effect nullified the protection of confidentiality that Section 1104 of the Federal Aviation Act

was intended to provide. The decision is likely to impair the Federal Aviation Administration's ability properly to perform its investigative functions.

Section 1104 provides important assistance to the FAA in promoting aviation safety,[12] as demonstrated by the SWAP program involved in this case. That program was based upon the frank and full voluntary disclosure by an airline of all matters, including problems and defects, to the FAA's expert inspectors so as to prevent or correct unsafe conditions before an accident occurred. If, however, those statements are to be made public, the airlines have indicated that their concern over the consequences of such disclosure will necessarily adversely affect their voluntary cooperation. Without that cooperation, the SWAP program will be seriously impaired.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
CARLA A. HILLS,
Assistant Attorney General.
ALLAN ABBOT TUTTLE,
Assistant to the Solicitor General.
LEONARD SCHAITMAN,
THOMAS G. WILSON,
Attorneys.

OCTOBER 1974.

[12] The FAA has advised that since 1958, it has granted 75 requests for nondisclosure under Section 1104.

APPENDIX A

United States Court of Appeals
for the District of Columbia Circuit

No. 72-2186

REUBEN B. ROBERTSON, III, ET AL.

v.

ALEXANDER P. BUTTERFIELD, ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, ET AL., APPELLANTS

Appeal from the United States District Court for the District of Columbia

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Decided May 9, 1974

Harold H. Titus, Jr., United States Attorney at the time the brief was filed, *Robert E. Kopp* and *Thomas G. Wilson*, Attorneys, Department of Justice, were on the brief for appellants.

Alan B. Morrison and *Ronald L. Plesser*, were on the brief for appellees.

Before BAZELON, *Chief Judge*, FAHY, *Senior Circuit Judge*, and ROBB, *Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* FAHY.

Dissenting opinion filed by *Circuit Judge* ROBB.

FAHY, *Senior Circuit Judge:* The appeal raises the question whether the Federal Aviation Administration

is obligated under the Freedom of Information Act, 5 U.S.C. § 552, to disclose to appellees, plaintiffs in the District Court, certain reports in the files of the Administration. These reports, compiled under what is known as the System Worthiness Analysis Program (SWAP), consist of analyses made by employees of the Administration of the operation and maintenance performance of airlines, under the responsibility of the Administration to regulate the safety of civil aeronautics.[1] Special teams of experienced inspectors make periodic visitations of airlines to inspect and analyze their safety and maintenance operations. The findings and recommendations for corrective action are disclosed to the airline management in a meeting of Administration and airline personnel. A final SWAP report is thereafter prepared, containing the findings and recommendations of the inspection team. Appellees requested but were denied access to those reports for the year 1969. While an intra-agency appeal was pending the Air Transport Association, on behalf of numerous airlines which are members, requested that the Administrator issue an order under section 1104 of the Federal Aviation Act of 1958[2] withholding SWAP reports from the public. The Ad-

[1] See section 601(a) of the Federal Aviation Act, as amended, 49 U.S.C. § 1421(a).

[2] Section 1104 of the Act reads:

"Any person may make written objection to the public disclosure of information contained in any application, report, or document filed pursuant to the provisions of this chapter or of information obtained by the Board or the Administrator, pursuant to the provisions of this chapter, stating the grounds for such objection. Whenever such objection is made, the Board or Administrator shall order such information withheld from public disclosure when, in their judgment, a disclosure of such information would adversely affect the interests of such person and is not required in the interest of the public. . . ." 49 U.S.C. § 1504 (1970).

ministrator, complying, ruled that all SWAP reports, not only those requested by appellees, but all in existence and thereafter to be compiled, should be withheld from public disclosure because "disclosure of the information contained therein would adversely affect the interests of the airline being investigated and is not required in the interest of the public."

I

Appellees' suit in the District Court for injunctive relief under the Information Act ensued. The court granted their motion for summary judgment as to Count I of the Complaint, which raised the issue as to the SWAP reports, and ordered the Administrator to release the reports, holding, "the documents sought by plaintiffs in Count I are, as a matter of law, public and non-exempt within the meaning of 5 United States Code 552. . . ." All other counts were dismissed.[3]

No other explanation of the decision appears, but it is clear from the above posture of the case that Exemption (3) of the Information Act, relied upon by appellants in the District Court, was held not to apply. That exemption protects from disclosure matters "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3). We are accordingly faced with the question whether Exemption (3), considered with the Administrator's action under section 1104 to which we have referred, protects the reports from disclosure as matters "specifically exempted from disclosure by statute." We think not, for reasons now explained.

[3] No appeal is before us except from the grant of summary judgment for appellees on Count 1.

II

This court has continued to adhere to the position that exemptions of the Information Act are to be narrowly construed. *Vaughn* v. *Rosen*, 484 F. 2d 820 (D.C. Cir. 1973), *cert. denied*, —— U.S. —— (1974); *Cuneo* v. *Schlesinger*, 484 F. 2d 1086 (D.C. Cir. 1973), *cert. denied*, —— U.S. —— (1974). The ordinary meaning of the language of Exemption (3) is that the statute therein referred to must itself specify the documents or categories of documents it authorizes to be withheld from public scrutiny. Section 1104 of the Aviation Act fails to do this. It is, rather, a congressional delegation to the Board or Administrator of the Aviation Authority to weigh whether a person objecting to disclosure would be adversely affected by it, and whether, even if so affected, disclosure nevertheless "is not required in the interest of the public."

In *EPA* v. *Mink*, 410 U.S. 73 (1973), the Supreme Court considered a specific exemption by statute, Exemption (1) of the Information Act itself, which exempts matters "specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy." 5 U.S.C. § 552(b)(1). The documents sought to be disclosed had been classified as secret pursuant to Executive Order 10501.[4] Exemption (1) was construed to be a specific reference by Congress itself to a definite class of documents which were not to be disclosed. 410 U.S. at 83. Their disclosure accordingly was not required. No particular class of documents as such are referred to in section 1104 of the Aviation Act. The Administrator ordered the SWAP reports not to be disclosed although they did not fall within any congressionally specified statu-

[4] This Presidential order had served as the basis for classification of information "which requires protection in the interests of national defense."

tory category. It would be unacceptable to hold that his conclusion that disclosure of any and all of the reports requested [5] would adversely affect the interests of each airline covered, and is not required "in the interest of the public," is a specific exemption by section 1104. Not only would such an interpretation overstrain the language of Congress in Exemption (3), see *Cutler et al.* v. *C.A.B.*, C.A. No. 74-8, —— F. Supp. —— (D.D.C., April 3, 1974), it would also be at odds with the history and purpose of the Information Act considered in its relationship to section 1104, a matter further to be considered.

III

A. Before doing so, we note appellants' reliance upon the *Attorney General's Memorandum On the Public Information Section of the Administrative Procedure Act* (June, 1967), which contains the following:

> Explaining exemption (3) the House Report, at page 10, notes that there are "nearly 100 statutes or parts of statutes which restrict public access to specific Government records. These would not be modified by the public records provisions of S. 1160." [6]

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[5] Aside from all past and future SWAP reports.

[6] *Attorney General's Memorandum* at 31. But the Attorney General went on to say:

"The reference to nearly 100 statutes apparently was inserted in the House report in reliance upon a survey conducted by the Administrative Conference of the United States in 1962. This survey concluded that there were somewhat less than 100 statutory provisions which specifically exempt from disclosure, prohibit disclosure except as authorized by law, provide for disclosure only as authorized by law, or otherwise protect from disclosure. The reference therefore indicates an intention to preserve whatever protection is afforded under other

Appellants analogize the Administrator's authority under section 1104 with that of the Atomic Energy Commission under 42 U.S.C. §§ 2161–2166 (1970). In this connection appellants refer to *Mink, supra,* 410 U.S. at 77–78 n.4, where it is stated that material

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statutes, whatever their terms. For examples of the variety of statement of such provisions compare 18 U.S.C. 1905; 26 U.S.C. 6103; 42 U.S.C. 2000e–8, 2161–2166; 43 U.S.C. 1398; 44 U.S.C. 397; and 50 U.S.C. 403g."

Thus, the House Report's mention of "somewhat less than 100 statutory provisions" was quite indefinite. Moreover, as we stated in *Getman* v. *N.L.R.B.*, 450 F. 2d 670, 673, n.8 (D.C. Cir. 1971), the Senate Report is to be preferred for the reason stated in *Getman.*

Appellants' reliance upon the examples given by the Attorney General of statutes which may come within Exemption (3) also is excessive. Each of them can be distinguished from section 1104 of the Aviation Act:

18 U.S.C. § 1905 is a criminal statute prohibiting unauthorized disclosure of any information by a federal employee. There is nothing in the section which prevents the operation of the Information Act. It does not fall within the ambit of Exemption (3). *M. A. Schapiro* v. *S.E.C.*, 339 F. Supp. 467 (D.D.C. 1972); *Frankel* v. *S.E.C.*, 336 F. Supp. 675 (S.D.N.Y. 1971), *rev'd on other grounds* 460 F. 2d 813 (2d Cir.), *cert, denied*, 409 U.S. 889 (1972).

26 U.S.C. § 6103 represents the congressional judgment that federal income tax returns should remain confidential except in very limited and prescribed circumstances. This statute embodies the specificity which section 1104 of the Aviation Act lacks. *Federal Sav. & Loan Insur. Corp.* v. *Krueger*, 55 F.R.D. 512, 514 (N.D.Ill. 1972).

within those provisions might come within Exemption (3). Those provisions, however, refer to "Restricted Data"; so, too, does 42 U.S.C. § 2014(y), also mentioned by appellants. We consider such references to be in contrast with the broad discretionary

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42 U.S.C. § 2000e–8(e) is similar to 18 U.S.C. § 1905, *supra*, in that it prohibits the unauthorized disclosure by any EEOC employee of information dealing with unlawful labor practices. This statute, however, has a built-in time limit to non-disclosure, for it only prohibits disclosure "prior to the institution of any [unlawful labor practice] proceeding."

42 U.S.C. §§ 2161–2166 is discussed in the body of this opinion.

43 U.S.C. § 1398 presents yet another situation different from section 1104. Section 1398 provides that confidential information submitted by witnesses before the Public Lands Commission shall remain confidential. The distinguishing mark of the section, as contrasted with section 1104, is that no discretion is vested in the Public Lands Commission.

44 U.S.C. § 397 is now codified as 44 U.S.C. §§ 2103–2111 and is quite specific with respect to the powers and duties of the Archivist of the United States and the Administrator of General Services. The statute grants very little discretion to either official regarding whether public documents should be disclosed or remain confidential. *See Nichols* v. *United States*, 460 F. 2d 671, 673–74 (10th Cir. 1972).

Finally, 50 U.S.C. § 403g concerns one aspect of the duties of the director of the Central Intelligence Agency. By this section Congress, in the interest of national security, specifically exempts the CIA from disclosing, *inter alia*, the names, positions, functions or salaries of its employees as was required by 5 U.S.C. § 654 (1958), *repealed* by Pub. L. 86–626, 74 Stat. 427 (July 12, 1960).

authority conferred by section 1104. The latter mentions no particular category of information. It applies generally to any document filed pursuant to the Aviation Act which the Board or Administrator decides to bring within the non-disclosure provisions. The Administrator's decision in this case merely repeated the congressional language and offered no supporting explanation.

Davis, *Administrative Law,* section 3A.18 (1970 Supp.) refers to Exemption (3) in its application *vel non* to the non-disclosure power of the Security and Exchange Commission, somewhat like that available to the present Administrator. Disclosure is available "only when in its [the S.E.C.'s] judgment a disclosure of such information is in the public interest." Professor Davis states that this language "perhaps" serves specifically to exempt "whatever information the Commission, acting within the power granted, decides to withhold." *Id.* The statute, 15 U.S.C. § 78x, is subject to the same analysis applicable to 42 U.S.C. §§ 2161–2166, *supra.* Section 78x(a) reads:

> Nothing in this chapter shall be construed to require . . . the revealing of *trade secrets* or *processes* in any application, report or document filed with the Commission under this chapter. (Emphasis added.)

It goes on to allow the Commission some discretion, to decide which trade secrets or processes should be disclosed in the "public interest."

B. Analyzing somewhat further the legislative history, the House Report accompanying the Information Act lists three major purposes of the legislation, including the following:

> [The Act] sets up workable standards for the categories of records which may be exempt from public disclosure, replacing the vague phrases

> "good cause found," *"in the public interest,"* and "internal management" with specific definitions of information which may be withheld. (Emphasis added.)

H.R. REP. No. 1497, 89th Cong., 2d Sess. at 2 (1966).

As we have seen, the previously enacted section 1104 of the Aviation Act vests in the Board or Administrator of the Federal Aviation Authority the discretion to judge "when . . . a disclosure of such information would adversely affect the interests of such person [requesting nondisclosure] and is not required in the interest of the public", thus containing the broad vagueness which, according to the House Report, the Information Act was designed to remove from the public disclosure section of the Administrative Procedure Act. To hold that section 1104 remained unaffected by Exemption (3) we think would contradict a stated purpose of the Information Act and violate a primary rule of statutory interpretation. *Reliance Electric Co.* v. *Emerson Electric Co.*, 404 U.S. 418, 424 (1972).

During the debate of the Information Act on the floor of the House a question arose with respect to the application of Exemption (3) to information supplied to the Bureau of Census under the statutory provisions requiring such information to remain confidential. 13 U.S.C. § 9 (1970). The Chairman of the House subcommittee in charge of the legislation stated that the census information was within Exemption (3) as material "specifically exempted from disclosure by statute." 112 CONG. REC. 1346 (1966). Section 9 of the census statute, however, had previously been interpreted by Judge Weinfeld of the United States District Court for the Southern District of New York in *United States* v. *Bethlehem Steel Corp.*, 21 F.R.D. 568 (S.D.N.Y. 1958), where he held in a comprehen-

sive opinion that, "the language of the [census] statute is clear and unambiguous," *Id.* at 569–70, and in it "Congress has recognized and created an express privilege" of confidentiality with specific statutory exceptions. *Id.* at 570, 571.

The Senate Report reflects the House's concern over governmental misuse of the APA and expresses as follows the purpose of the Information Act:

> Innumerable times it appears that information is withheld only to cover up embarrassing mistakes or irregularities and the withholding justified by such phrases in section 3 of the Administrative Procedure Act as—"requiring secrecy in the public interest," or "required for good cause to be held confidential."
>
> It is the purpose of the present bill to eliminate such phrases, to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language and to provide a court procedure by which citizens and the press may obtain information wrongfully withheld. It is important and necessary that the present void be filled. It is essential that agency personnel, and the courts as well, be given definitive guidelines in setting information policies. Standards such as "for good cause" are certainly not sufficient.

S. Rep. No. 813, 89th Cong., 1st Sess. at 3 (1965).

C. Aware as we are of the thoughts of others adduced to support appellants' position, we are nevertheless persuaded that they should not control the court's construction of the language before us. An overriding consideration is the reasonably plain statutory language[7] of Congress in Exemption (3), considered with the basic purpose of the Information Act calling for

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[7] *Gemsco, Inc.* v. *Walling*, 324 U.S. 244, 260 (1945); *Addison* v. *Holly Hill Co.*, 322 U.S. 607, 616–17 (1944).

narrow, though, of course, not artifically so, application of its non-disclosure exemptions. *Vaughn* v. *Rosen, supra.* Moreover, further consideration of the relationship between the Information Act and the earlier Aviation Act, now to be outlined in Part IV, we think is persuasive of the correctness of the decision of the District Court.

IV

Both statutes—section 1104 and the Information Act—have to do with disclosure of government information. They are *pari materia* and should be construed together so as to effectuate the over-all congressional policy. This approach is peculiarly appropriate in a case involving section 1104, in which the final statutory standard upon which disclosure turns is the public interest. The Information Act is now the basic congressional expression of the public interest with respect to information in the possession of the federal government. When a previously enacted statute, such as 1104, has provided such a standard the subsequently enacted and comprehensive Information Act, in the varied circumstances enumerated in its provisions, is the guide to the congressional intent with respect to the public interest. This view is confirmed indirectly by the Supreme Court in *Mink.* The Court there discussed the legislative development culminating in the replacement by the Information Act of section 3 of the Administrative Procedure Act. 5 U.S.C. § 1002 (1964). That section, the Court stated, fell "far short of its disclosure goals and came to be looked upon more as a withholding than a disclosure statute."[8] Continuing, the Court said that section 3 was:

[8] *See Bristol-Myers Co.* v. *F.T.C.*, 424 F. 2d 935, 938 (D.C. Cir. 1970).

> . . . plagued with vague phrases, such as that exempting from disclosure "any function of the United States requiring secrecy in the *public interest.*" (Emphasis added.)

410 U.S. at 79.

Accordingly, we believe it follows that the public interest standard of section 1104 is not a specific exemption by statute within the meaning of Exemption (3) of the Information Act.

We are not unmindful that many important regulatory statutes, such as the Federal Communications Act and the Natural Gas Act, invest agencies of government with authority to act upon the basis of the public convenience and necessity, or the public interest; but in so legislating Congress has guided action under these general standards by requiring hearings, with findings supported by evidence directed to the decisional catalyst so phrased, followed by the right of judicial review of the validity, procedurally and substantively, of the action taken. Nothing of the sort is attached to a determination of non-disclosure under section 1104. Even were we in error in holding action under that provision not within Exemption (3), such action in our opinion would require that the courts build upon the section at least procedural safeguards for review of the reasons for the determination, supported by findings to enable the court to appraise, as under the Information Act, the validity of non-disclosure.

V

In holding that Exemption (3) does not prevent disclosure of the SWAP reports we realize that appellants desire to press their claim under Exemption (7), especially in light of our decision in *Weisberg* v. *Department of Justice*, 489 F. 2d 1195 (D.C. Cir. 1973) (en banc). Therefore, we affirm the summary

judgment for appellees insofar as appellants rely upon Exemption (3) but remand the case for consideration of Exemption (7) or any other defense to disclosure appellants may raise except Exemptions (1) and (3).

Order granting summary judgment to appellees on Count 1 is affirmed, and case in other respects remanded to District court for further proceedings not inconsistent with this opinion.

ROBB, *Circuit Judge, dissenting:* The Federal Aviation Administration is required by law "to promote safety of flight of civil aircraft in air commerce" by the issuance of standards, rules and regulations. 49 U.S.C. § 1421(a). Under 49 U.S.C. § 1425(b) the Administrator is also required to employ inspectors who shall advise and cooperate with air carriers in the inspection and maintenance of aircraft, aircraft engines, propellers, and appliances used in air transportation. To carry out these mandates the FAA developed the Systemsworthiness Analysis Program (SWAP).

SWAP investigative teams composed of highly trained and experienced FAA inspectors make periodic visitations to certified air carriers to inspect and analyze their maintenance and safety operations. A SWAP inspection covers the entire operation of the carrier being studied, including such matters as flight crew training, non-flight crew training, airport and communications facilities, flight operations policies and procedures, air carrier records and crew scheduling, and check airmen and examiners. *See* SWAP HANDBOOK, FAA Order 8000.3C. The investigative team works in close cooperation with airline management to find any area of maintenance, operations, management or performance which needs improve-

ment. To facilitate cooperation and the full and frank disclosure by the airline upon which the system depends, the SWAP program operates with the understanding between the airlines and the FAA that the contents of SWAP reports will not be released to the public. FAA Order 8000.3C para. 204. The findings of a SWAP inspection team are disclosed to the operator under examination, to enable that operator to discuss them intelligently, but they are not made available to any other operator.

Against this background the airlines, invoking section 1104 of the Federal Aviation Act of 1958, 49 U.S.C. § 1504, objected to the public disclosure of SWAP reports. The airlines stated:

> As has been set forth by the FAA in a memorandum to its regions dated February 7, 1967, "The SWAP Program requires a cooperative effort on both the part of the company and FAA if it is to work effectively." Information freely given to the FAA SWAP team by air carrier management personnel is not specifically required by the FAR's [Federal Aviation Regulations].
>
> If public disclosure of the SWAP reports were made, the interests of aviation safety would be in danger of being subordinated in some degree to legal considerations in the presentation of information to the FAA. The present practice of nonpublic submissions, which includes even tentative findings and opinions as well as certain factual material, encourages a spirit of openness on the part of airline management which is vital to the promotion of aviation safety—the paramount consideration of airlines and government alike in this area.

(J.A. 100.)

The Administrator sustained the objection, holding that disclosure of SWAP reports "would adversely

affect the interests of the airline being investigated and is not required in the interest of the public." I think the Administrator's ruling was justified by exemption (3) of the Freedom of Information Act, 5 U.S.C. § 552(b)(3).

Congress did not intend the Freedom of Information Act to repeal all other statutes which restricted public access to government records. Thus, Senator Long, Chairman of the Senate Judiciary Committee's Subcommittee on Administrative Practice and Procedure, and a leading proponent of the Freedom of Information Act stated:

> It should be made clear that this bill in no way limits statutes specifically written with the congressional intent of curtailing the flow of information as a supplement necessary to the proper functioning of certain agencies.

Hearings on S. 1166 and S. 1663 (in part), Before the Subcomm. on Administrative Practice and Procedure of the Senate Judiciary Committee, 88th Cong., 1st Sess. 6 (1963). Again, in explaining exemption (3) the House Committee on Government Operations noted that there are *"nearly 100 statutes or parts of statutes which restrict public access to specific Government records. These would not be modified by the public records provisions of S. 1160."* (H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10.) (Emphasis added.) Commenting on the House Report the Attorney General's memorandum on the Public Information Section of the Administrative Procedure Act (June 1967) stated:

> The reference to "nearly 100 statutes" apparently was inserted in the House report in reliance upon a survey conducted by the Administrative Conference of the United States in 1962. This survey concluded that there were somewhat less than 100 statutory provisions

> which specifically exempt from disclosure, prohibit disclosure except as authorized by law, provide for disclosure only as authorized by law, or otherwise protect from disclosure. The reference therefore indicates an intention to preserve whatever protection is afforded under other statutes, *whatever their terms.* (Emphasis added.)

Section 1104 is tailored to the needs and problems of the Federal Aviation Administration—needs and problems which are well illustrated by this case. I cannot believe that this specific statute was overridden or repealed by the general terms of the Freedom of Information Act. The earlier and specific statute should prevail over the later more general enactment. In particular, the later act should not be read to delete the "public interest" standard from every disclosure statute in which it appears—including section 1104.

The Circuit Court of Appeals for the 5th Circuit has held that exemption (3) authorizes the Federal Aviation Administration to withhold information pursuant to section 1104, 49 U.S.C. § 1504. *Evans* v. *Dept. of Transportation,* 446 F. 2d 821 (5th Cir. 1971), *cert. denied,* 405 U.S. 918 (1972). I agree.

I respectfully dissent.

APPENDIX B

United States Court of Appeals for the District of Columbia Circuit

September Term, 1973

No. 72-2186

Civil Action 1970-71

Filed May 9, 1974

REUBEN B. ROBERTSON, III, ET AL.

v.

JOHN J. SHAFFER, ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, ET AL., APPELLANTS

Appeal from the United States District Court for the District of Columbia

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Before BAZELON, *Chief Judge*, FAHY, *Senior Circuit Judge*, and ROBB, *Circuit Judge*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. On consideration thereof, it is

ORDERED AND ADJUDGED by this Court that the order of the District Court granting summary judgment to appellees on Count 1 of the complaint is hereby affirmed, and the case in all other respects is

remanded to the District Court for further proceedings not inconsistent with the opinion filed herein this date.

Per Curiam
For the Court:

HUGH E. KLINE,
Clerk.

Date:
Opinion for the Court filed by Senior Circuit Judge Fahy.
Dissenting opinion filed by Circuit Judge Robb.

APPENDIX C

In the United States District Court for the District of Columbia

Civil Action No. 1970–71

Filed November 8, 1972

REUBEN B. ROBERTSON, III

AND

JEROME B. SIMANDLE, PLAINTIFFS

vs.

JOHN H. SHAFFER,

ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION

FEDERAL AVIATION ADMINISTRATION
AIR TRANSPORT ASSOCIATION OF AMERICA

JOHN A. VOLPE, SECRETARY, DEPARTMENT OF TRANSPORTATION

DEPARTMENT OF TRANSPORTATION, DEFENDANTS

ORDER GRANTING SUMMARY JUDGMENT AS TO COUNT I AND DISMISSING THE REMAINING COUNTS

Upon consideration of plaintiffs' motion for partial summary judgment and Federal defendants' cross-motion for partial summary judgment embracing Count I of the Complaint herein, the points and authorities, the pleadings, affidavits and exhibits in support thereof and in opposition thereto, and it appearing to the satisfaction of the Court that there is

no genuine issue of material fact in that the documents sought by plaintiffs in Count I are, as a matter of law, public and non-exempt within the meaning of 5 United States Code 552, and plaintiffs are entitled to judgment on said count as a matter of law; and upon consideration of the Motion of Federal Defendants to Dismiss or for Summary Judgment with respect to Counts II through VI of the Complaint, the points and authorities in support thereof and in opposition thereto, and it appearing to the Court that neither of said Counts states a claim upon which relief can be granted; it is by the Court this 8th day of November 1972.

ORDERED and ADJUDGED:

1. That plaintiffs' motion for partial summary judgment embracing Count I of the complaint be and the same hereby is granted and that the defendant Federal Aviation Administration grant plaintiffs and their agents immediate access to Mechanical Reliability Reports and Systemworthiness Analysis and Program Reports upon terms and conditions no more burdensome than those which are imposed upon persons connected with the airline industry.

2. That the cross-motion of Federal defendants for partial summary judgment with respect to Count I of the complaint be and the same hereby is denied.

3. That the motion of Federal Defendants to dismiss Counts II through VI of the complaint is granted and Counts II through VI are hereby dismissed each for failure to state a claim upon which relief can be granted.

4. That plaintiffs' objection to the recommendation of the assistant pre-trial examiner is overruled as moot.

/s/ JOSEPH C. WADDY, *Judge.*

APPENDIX D

United States Court of Appeals for the District of Columbia Circuit

September Term, 1973

Civil Action 1970–71

No. 72–2186

Filed July 11, 1974

REUBEN B. ROBERTSON, III, ET AL.,

v.

JOHN H. SHAFFER, ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, ET AL., APPELLANTS

Before: BAZELON, *Chief Judge;* FAHY, *Senior Circuit Judge* and ROBB, *Circuit Judge.*

ORDER

On consideration of appellants' petition for rehearing, it is

ORDERED by the Court that appellants' aforesaid petition is denied.

Per Curiam For the Court:

HUGH E. KLINE,
Clerk.

APPENDIX E

United States Court of Appeals for the Fourth Circuit

No. 73-1699

MARY HELEN SEARS, APPELLANT

v.

ROBERT GOTTSCHALK, COMMISSIONER OF PATENTS, APPELLEE

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Oren R. Lewis, District Judge

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Argued March 6, 1974

Decided August 14, 1974

Before WINTER, BUTZNER and FIELD, *Circuit Judges.*

Edward S. Irons for Appellant; Thomas G. Wilson, Attorney, United States Department of Justice, (Irving Jaffe, Acting Assistant Attorney General, Brian P. Gettings, United States Attorney, Leonard Schaitman and Barbara L. Herwig, Attorneys, United States Department of Justice, on brief) for Appellees.

WINTER, *Circuit Judge:*

Suing under the Freedom of Information Act, 5 U.S.C. § 552 (FOIA), plaintiff, a patent attorney, sought to enjoin defendant from withholding "abandoned U.S. patent applications" from her and the pub-

lic. The suit was instituted because plaintiff's request to make available to her "all existing abandoned U.S. patent applications" had been denied by the defendant on the ground that the matters sought were barred from disclosure by 35 U.S.C. § 122 (1970). The district court concluded that the documents sought were exempt from compelled disclosure on the alternate grounds that they were "specifically exempted from disclosure by statute," as provided in 5 U.S.C. § 552 (b)(3), and that they contained "trade secrets and commercial or financial information obtained from a person and privileged or confidential," as provided in 5 U.S.C. § 552(b)(4). We conclude that the district court was correct in its conclusion that abandoned patent applications are statutorily exempt from the necessity of disclosure under FOIA. We perceive no constitutional obstacle to this conclusion, and we do not think that a three-judge court was required in order to reach it. We affirm the order of the district court.

I.

A patent application is, of course, an application for the grant of a patent under the provisions of 35 U.S.C. §§ 1 *et seq.* Patent applications fall into three categories: (a) those in the process of consideration by the patent office—"pending application," (b) those denied by the patent office as to which the applicant has not sought judicial review,[1] and those abandoned by formal relinquishment[2] or mere default,[3] before the patent

[1] The right to judicial review of the denial of a patent is found in 35 U.S.C. §§ 141 and 145.

[2] 37 C.F.R. §§ 1.138, 1.139.

[3] 35 U.S.C. § 133; 37 C.F.R. § 1.135. Patent applications abandoned by default may be revived, however, by a verified statement satisfying the Commissioner of Patents that "the delay was unavoidable." 37 C.F.R. § 1.137.

office has taken final action—"abandoned applications," and (c) applications which have ripened into the grant of a patent—"matured or granted applications."

Plaintiff makes no claim that "pending applications" should be available for public inspection; indeed, she readily concedes their confidentiality under 35 U.S.C. § 122. When applications mature into the grant of a patent, a copy of the specification and drawing of the patent are annexed to the patent, 35 U.S.C. § 154, and they are open to the public for inspection and copying.[4] Thus, plaintiff's request was to have access to and examine only those falling into the second category—"abandoned applications," and only those are the subject of suit.

The patent office denies access to or inspection of both pending applications and abandoned applications. As to the latter, indices of abandoned applications are maintained, and the applications themselves or a microfilm thereof have been preserved. While the record does not reflect the fact with certainty, it appears that most, if not all, abandoned applications are extant, although, as might be expected, not all could be produced without some inconvenience and expense.[5] The record indicates that some portions of abandoned applications contain trade secrets. But it is argued

[4] By 35 U.S.C. § 112, the "specification" of a patent application is "a written description of the invention, and of the manner and process of making and using it . . . and [it] shall set forth the best mode contemplated by the inventor of carrying out his invention." The completeness of the disclosure is thus manifest.

[5] 5 U.S.C. § 552(a)(3) permits an agency to exact "fees to the extent authorized by statute" as a condition precedent to making records promptly available to any person. In the instant case, it has been stipulated that plaintiff's request for inspection was "made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed" in compliance with § 552(a)(3).

that the evidence on this fact was received *ex parte* and we should conclude that the Commissioner of Patents has failed to satisfy the burden of proof to enable him to claim the "trade secret" exemption to disclosure. We need not concern ourselves with this contention, however, because we do not reach the district court's alternative holding that the trade secret exemption of FOIA is applicable.

II.

The legal dispute between the parties arises from two statutes. The first is FOIA, which requires each agency "on request for *identifiable records* . . . [to] make the records promptly available to any person." (Emphasis added.) 5 U.S.C. § 552(a)(3). Among the exceptions to this mandate are records "specifically exempted from disclosure by statute," § 552(b)(3). The second statute from which the dispute arises is the provision of the patent title, 35 U.S.C. § 122, which states:

> Applications for patents shall be kept in confidence by the Patent Office and no information concerning the same given without authority of the applicant or owner unless necessary to carry out the provisions of any Act of Congress or in such special circumstances as may be determined by the Commissioner.

On the merits of the ultimate question, plaintiff contends that the § 122 rule of confidentiality applies only to pending applications and not to abandoned applications, and therefore the § 552(b)(3) exception to the mandate of § 552(a)(3) does not apply. Preliminarily, she asserts that § 122 is not the type of statute to qualify for the § 552(b)(3) exception, because it authorizes the Commissioner to disclose mat-

ters required to be kept confidential if he determines that disclosure is justified.[6]

Defendant argues that plaintiff's request to inspect "all existing abandoned U.S. patent applications" is not a request for "identifiable records" within the meaning of § 552(a)(3), and plaintiff's suit should be dismissed on that basis. On the merits, defendant contends that the rule of confidentiality embodied in § 122 applies to abandoned applications as well as pending applications, and that § 122 is a statute of the kind contemplated by § 552(b)(3), so that plaintiff's request is defeated by § 552(b)(3).

III.

We are not persuaded by defendant's argument that plaintiff's request to inspect was so lacking in specificity that the records sought were not "identifiable records" within the meaning of § 552(a)(3). The purpose of the "identifiability" requirement is to generate a "reasonable description enabling the Government employee to locate the requested records." *Bristol-Myers Co.* v. *F.T.C.*, 424 F. 2d 935, 938 (D.C. Cir. 1970) (quoting S. Rept. No. 813, 89th Cong., 1st Sess. at 8). Although plaintiff's request was far reaching,[7] that purpose was met. Aside from the sheer bulk of the material to which access was sought and the accompanying expense and inconvenience of making it available for inspection, defendant makes no claim that he does not know what plaintiff wishes to see or where to locate it. The case is thus different from *Irons* v. *Schuyler*, 465 F.2d 608 (D.C. Cir.

[6] Plaintiff makes other contentions which we need not describe, discuss or decide in the view that we take of a proper disposition of the case.

[7] See the factual statements in *Irons* v. *Schuyler*, 465 F. 2d 608, 611 (D.C. Cir. 1972), cert. den., 409 U.S. 1076 (1972).

1972), where access was sought to "all unpublished manuscript decisions of the Patent Office" and where it appeared that there were more than 4,780,000 files, "any of which may contain one or more manuscript decisions." In that case, inspection was denied, but the decision turned on the difficulty of locating the requested records rather than the categorical nature of the request; we, therefore, do not deem it controlling here. If otherwise locatable, the rule in this circuit is that equitable considerations of the costs, in time and money, of making records available for examination do not supply an excuse for non-production. *Ethyl Corp.* v. *Environmental Protection Agency*, 478 F. 2d 47 (4 Cir. 1973); *Wellford* v. *Hardin*, 315 F.S. 175 (D. Md. 1970), aff'd 444 F. 2d 21 (4 Cir. 1971). See also *National Cable Television Assn., Inc.* v. *F.C.C.*, 479 F. 2d 183 (D.C. Cir. 1973); *Gelman* v. *N.L.R.B.*, 450 F. 2d 670 (D.C. Cir. 1971).

IV.

Nor do we see merit in plaintiff's argument that, since the Commissioner may disclose patent applications "in such special circumstances as may be determined by the Commissioner," § 122 is not the sort of statute contemplated by the (b)(3) exception to the disclosure requirement of FOIA.[8] The question of whether a statute which confers discretion to determine whether to make records of his agency publicly available "specifically exempts from disclosure" the material over which the Administrator has discretion is not without difficulty. Professor Davis resolves this

[8] If this argument prevails, FOIA plaintiffs will be able to compel public disclosure of all applications both pending and abandoned, notwithstanding plaintiff's concession that pending applications are protected from disclosure.

question in favor of the availability of the exception.[9] He reasons that the specific intent of Congress to maintain in secret that which the administrator determines should be so maintained should not be overridden by the more general provisions of the FOIA.

We are aware of only two cases which bear directly on this question. In *Evans* v. *Dept. of Trans.*, 446 F. 2d 821 (5 Cir. 1971), the Fifth Circuit, in an alternative holding said that the (b)(3) exception was available for matters which a statute authorized an administrator to withhold if he found that

> disclosure of such information would adversely affect the interests of such person [he who provided the information to the administrator] and is not required in the interest of the public.[10]

It is noteworthy that the Congress had provided some standards for the exercise of discretion in the statute under consideration in *Evans*.

A recent Third Circuit case, drawn to our attention by post-argument memoranda, emphasizes the absence of statutory guidelines for the exercise of discretion in holding that 42 U.S.C. § 1306(a), which reads

> No disclosure of any . . . report obtained at any time by the Secretary . . . or employee of the Department . . . in the course of discharging their duties under this chapter [the chapter on social security] shall be made except as the Secretary . . . may by regulation prescribe,

will not support the (b)(3) exception. *Stretch* v. *Weinberger*, F. 2d ——, No. 73–1547 (3 Cir. March 5, 1974). However, in *Stretch*, the court placed equal emphasis on the lack of specificity in the phrase "any

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[9] Davis, Administrative Law, § 3A.18 (1970 Supp.).

[10] 49 U.S.C. § 1504 (1970).

record"—the definition of the matters to be kept confidential within the Secretary's discretion. The court stated the rule to be that

> "matters are . . . specifically exempted from disclosure by statute" only if a statute *either* identifies some class or category of items that Congress considers appropriate for exemption *or,* at least, sets out legislatively prescribed standards or guidelines that the Secretary must follow in determining what matter shall be exempted from disclosure. (Emphasis added).[11]

From this language, we infer that the Third Circuit would be satisfied that the phrase "applications for patents" sufficiently identifies the class of items Congress deems appropriate for exemption so that the absence of guidelines in § 122 for the exercise of the Commissioner's discretion would not be determinative.

Plaintiff, of course, argues that, where the administrator has unbridled discretion to disclose or not disclose a class of items, the (b)(3) exception should be unavailable regardless of how carefully such class is identified. But we are persuaded of the correctness of the Third Circuit view. The presence of guidelines for the exercise of discretion to withhold or disclose qualifies a statute to be the basis of a (b)(3) exception. The phrase "such special circumstances as may be determined by the Commissioner" is such a standard. It incorporates the then existing administrative standards for disclosure of patent applications embodied in Rule 14(a) and (b).[12] In turn, the standards found in Rule 14 are sufficiently specific that they meet the "specifically exempting" requirement of the (b)(3) exception. Since the legislative history is clear that § 122 was intended to codify the Patent Office rule of secrecy, whatever it may have been, we see no

[11] Slip Opinion at 3.

[12] 37 C.F.R. § 114(a), (b).

insuperable barrier to reading the guidelines for the exercise of the Commissioner's discretion to disclose back into the statute. We therefore hold that § 122 "specifically exempts" applications for patents from disclosure within the meaning of § 552(b)(3).

V.

Thus, we are brought to the ultimate question of how, in this case, to apply 5 U.S.C. § 552(a)(3) in the light of 5 U.S.C. § 552(b)(3) and 35 U.S.C. § 122. We begin by recognizing that in *Kewanee Oil Company* v. *Bicron Corporation*, —— U.S. ——, ——, 42 L.W. 4631, 4636 (May 13, 1974), the Supreme Court has recently stated:

> The mere filing of applications doomed to be turned down by the Patent Office will bring forth no new public knowledge or enlightenment, since under federal statute and regulation patent applications and abandoned patent applications are held by the Patent Office in confidence and are not open to public inspection. 35 U.S.C. § 122; 37 C.F.R. § 1.14(b).

While at first blush this sentence may seem to decide the instant case, we are persuaded that it has not, and that the issue is before us for initial adjudication.

Kewanee was a diversity action in which a manufacturer of synthetic crystals sought injunctive relief and damages under Ohio law against certain former employees and the corporation that they caused to be organized on the grounds that defendants had misappropriated plaintiff's trade secrets. The district court, applying Ohio law, granted relief, but the Court of Appeals reversed on the ground that Ohio's trade secret law conflicted with, and hence was preempted by, the federal patent laws. The Supreme

Court reversed the judgment of the Court of Appeals and reinstated that of the district court. The principal discussion in its opinion was about whether there was a conflict between the provisions and purposes of the federal patent laws and the Ohio law of trade secrets. It was with regard to a trade secret known not to be patentable that the Supreme. Court made the statement quoted to demonstrate that the Ohio law which protected such a trade secret did not conflict with federal patent law.

There is nothing in the opinion in *Kewanee* to indicate that the *legality* of suppressing all information contained in abandoned applications was either litigated or decided. The quoted statement appears to be nothing more than a factual recitation of the surface provisions of the existing statute and regulation. Indeed, the statement is not necessarily even one that § 122 prescribes a rule of confidence for abandoned patents. This is so because the statement speaks of both "patent applications" and "abandoned patent applications," citing § 122 and 37 C.F.R. § 1.14(b)—which relates only to abandoned patent applications—but *not* 37 C.F.R. § 1.14(a)—which relates to pending patent applications. It follows that the statement may be read to invoke only § 1.14 (b) of the regulations, and *not* § 122 of the statute, as support for its comment about the confidentiality of abandoned patent applications. Hence, we feel free to deal with the case on the merits as presenting a question of first impression; and, as we will show, we conclude that the statement in *Kewanee* is indeed the law with respect to abandoned applications.

VI.

In *Ethyl Corp.* v. *Environmental Protection Agency*, 478 F. 2d 47, 48–49 (4 Cir. 1973), affirming our prior

decision in *Welford* v. *Hardin*, 444 F. 2d 21, 25 (4 Cir. 1971), we said:

> The Freedom of Information Act was intended to express in statutory form the firm obligation of governmental agencies to make disclosure to "any person" of identifiable information and facts in their possession, limited only by specific exemptions. Specifically, it denied the federal agency any right to "refuse disclosure of materials covered by the Act for any reason other than one contained in the exclusionary section of the legislation." The legislative history of the Act makes it clear that the obligation to produce thereby mandated is to be construed *broadly* and the exemptions from such obligation *narrowly*. In short, the Act makes disclosure the rule and secrecy the exception. (Emphasis in original).[13]

This is the spirit in which we approach the main question and this is why, in order for a failure to disclose to be sustained under § 552(b)(3), there must be *strict* compliance with its requirement that a matter be "*specifically* exempted" from disclosure by statute. The language in § 122 creating confidentiality speaks of "[a]pplications for patents." The language is broad enough to include all categories of applications—pending, abandoned and granted—[14] and that

[13] *Ethyl Corp.* was decided after *Environmental Protection Agency* v. *Mink*, 410 U.S. 73 (1973). That it is in accord with controlling precedents is demonstrated by the characterization in the later decision of *Renegotiation Board* v. *Bannercraft Clothing Co., Inc.*, —— U.S. ——, —— (February 19, 1974)—"The Broad language of the FOIA, with its obvious emphasis on disclosure and with its exemptions carefully delineated as exceptions . . ."—in reaching the holding that FOIA does not limit the inherent powers of an equity court to grant relief.

[14] The disclosure of the essential portions of the applications for a patent when the patent is granted results from the provisions of 35 U.S.C. §§ 112 and 154 and not from the provisions of § 122.

would appear to be the legislative intent of Congress. Especially is this so when the adjective of qualification—"pending"—could so easily have been employed had Congress intended the operative effect of § 122 to be limited to pending applications for patents as plaintiff contends. Moreover, the concept of an abandoned application for a patent is a flexible one. Both 35 U.S.C. § 133 and 37 C.F.R. § 1.137 permit the revival of an abandoned application under certain circumstances. Thus, what may be an abandoned application, which plaintiff claims the right to inspect, may subsequently resume being a pending application, which plaintiff concedes is immune to inspection. When an "abandoned" application does not necessarily remain abandoned, it is difficult to give the language of § 122 the discriminating effect urged by plaintiff.

Lest the language of § 122 be not itself sufficient "specifically" to clothe abandoned patent applications with confidentiality, we turn to its legislative history. The enactment of § 122 was part of the overall revision and reenactment of the patent laws in 1952. Both the House and Senate reports state that "[s]ection 122 incorporates into the title the rule of secrecy of patent applications *which has existed in the Patent Office for generations.*" (Emphasis added). H. Report No. 1923, 82d Cong., 2d Sess. at 7 (1952); S. Report No. 1979, 82d Cong. 2d Sess. at 6 (1952). The fact is that, while the regulations of the Patent Office have spoken of pending and abandoned applications on a parity as to secrecy only since 1952, for *ninety* years prior thereto, and hence for the "generations" referred to in the legislative history of § 122, the practice of the Patent Office has been to treat them alike.

The text of the Patent Office rule in effect in 1952

(and also in effect at the present) is set forth in the margin.[15] It will be noted that subsection (a), with an exception not pertinent, states that "pending patent applications are preserved in secrecy," and subsection (b) states that "abandoned patent applications are *likewise* not open to public inspection" (emphasis added) except those referred to in a patent.[16]

The rule was promulgated December 31, 1948, to become effective March 1, 1949.[17] Prior to 1949, pending and abandoned applications were usually the subjects of separate rules but they were, for practical

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[15] 37 C.F.R. § 1.14. *Patent applications preserved in secrecy.*

(a) Except as provided in § 1.11(b) pending patent applications are preserved in secrecy. No information will be given by the Office respecting the filing by any particular person of an application for a patent, the pendency of any particular case before it, or the subject matter of any particular application, nor will access be given to or copies furnished of any pending application or papers relating thereto, without written authority in that particular application from the applicant or his assignee or attorney or agent of record, unless it shall be necessary to the proper conduct of business before the office or as provided by this part.

(b) Except as provided in § 1.11(b) abandoned patent applications are likewise not open to public inspection, except that if an application referred to in a U.S. patent is abandoned and is available, it may be inspected or copies obtained by any person on written request without notice to the applicant. Abandoned applications may be destroyed after 20 years from their filing date, except those to which particular attention has been called and which have been marked for preservation. Abandoned applications will not be returned.

[16] Until 1879, the Patent Office, in the examination of pending applications, cited abandoned applications as references. This practice was discontinued in 1879. The current practice of *not* citing abandoned applications as references is set forth in 37 C.F.R. § 1.108.

[17] 13 Fed. Reg. 9577 (1948).

purposes, treated alike. Pending applications have always been accorded secrecy;[18] abandoned applications were not given formal secrecy until 1949, although access to them was restricted after 1879, when the Patent Office abandoned the practice of citing abandoned applications as references in the examination of pending applications.[19] The degree of restriction is highly significant. An examination of the opinions of

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[18] A brief history of the rules granting secrecy to pending applications follows:

The first rule appeared in 1854, and it provided:

"Aside from the caveats, which are required by law to be kept secret, all pending applications are, as far as practicable, preserved in like secrecy. No information will therefore be given to those inquiring whether any particular patent is before the office, or whether any particular person has applied for a patent."

With renumbering and inconsequential editorial change, the 1854 rule continued until 1879. In that year, the rule was revised twice, the latter version being:

"Caveats and pending applications are preserved in secrecy. No information will be given without authority . . . unless it shall be necessary to the proper conduct of the business before the office, as provided by Rules . . . ."

In 1897, the rule was revised in a manner creating an apparent dichotomy of treatment of pending and abandoned applications. The 1897 rule read:

"Applications will be preserved in secrecy, except as provided in the interference rules; but copies of abandoned applications, upon petition therefor, for sufficient cause . . . will be furnished by the Commissioner."

The next revision occurred in 1916 and, except for a right of inspection of pending applications by the military for inventions having value in the prosecution of World War I, it continued unchanged until the present rule became effective in 1949. The essence of the 1916 rule read:

"Pending applications are preserved in secrecy. No information will be given without authority . . . unless it shall be necessary to the proper conduct of business before the office, as provided by Rules . . . ."

the Supreme Court of the District of Columbia and the opinions of the Commissioner of Patents fairly demonstrate that, aside from an interference proceeding in the patent office, only a defendant in an infringement suit could obtain inspection of one or more specific abandoned applications, but then only if they were applications of the plaintiff who sued him for infringement and the defendant could allege that they contained material relevant to his defense. See U.S. *ex rel. Pollok* v. *Hall,* 48 O.G. 1263 (Sup. Ct. D.C. 1888); *Ex parte Fowler* and *Fowler,* 49 O.G. 562 (1889) *aff'd sub nom., U.S. ex rel. Fowler* v. *Commissioner,* 62 O.G. 1968 (Sup. Ct. D.C. 1890); *U.S. ex rel. Bulkley* v. *Butterworth,* 81 O.G. 505 (Sup. Ct. D.C. 1897); *Ex parte Warner,* 96 OG. 1238 (1901; In re Dyer, 106 O.G. 1508 (1903); *In re Ashtabula Telephone Company,* 110 O.G. 860 (1904); *In re Buck,* 113 O.G. 1418 (1904); *In re Taupenot,* 113 O.G. 1418 (1904).

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[19] Prior to 1879, the rules of the Patent Office made abandoned patent applications freely available to the public. The first rule relating to inspection of abandoned applications was adopted in 1879, and it provided:

"Certified copies of the files in cases of rejected or abandoned applications may be furnished to applicants or to other persons when specifically ordered, but no inspection of such files, except by the applicants or their duly authorized attorneys, will be permitted."

This rule continued until 1946, when it was revised into the following form:

"Copies of the files of forfeited and abandoned applications may be furnished when ordered by the Commissioner. The requests for such copies must be presented in the form of a petition properly verified as to all matters not appearing of record in the Patent Office." (See Form ——).

The 1946 revision continued until it was supplanted by 37 C.F.R. § 1.14(b).

Thus, it appears that while the Patent Office had, for generations, maintained separate rules limiting public access to pending and abandoned applications respectively, the practical effect of the two rules was identical. Since we look to substance rather than form, we think the difference in nomenclature preserved by the Patent Office for many years is of little significance and thus we conclude that the legislative history of § 122 only reenforces the facial breadth of the legislative command that abandoned as well as pending patent applications are protected from general public disclosure.[20] Notwithstanding FOIA's strong policy of disclosure, we hold that mandatory disclosure of abandoned patent applications is foreclosed by § 122.

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[20] Our conclusion is in accord with the views of an authoritative commentator on the meaning and effect of § 122. The statement in the House and Senate Reports on H.R. 7794 that § 122 would codify "the rule of secrecy of patent applications which has existed in the Patent Office for generations" was undoubtedly derived from the testimony of Mr. Federico in the hearings on H.R. 3760, a prior version of H.R. 7794. Section 122 of H.R. 3760 is identical to § 122 of H.R. 7794, which was enacted as the present patent title. Mr. Federico had long been an examiner in the Patent Office and had assisted the committee staff in drafting H.R. 3760. Thus, it is significant that after the enactment of present § 122, Mr. Federico wrote that § 122 "makes no distinction between pending applications and abandoned applications . . ." Federico, Commentary on the New Patent Act, 35 U.S.C.A. § 1, 1, 36.

Although entitled to less weight, we note also the pendency in Congress of proposals to abolish the secrecy rule as to both pending and abandoned patent applications. Proposed legislative abolition of the rule may well stem from the legislative understanding that the rule exists. See H.R. 7111, § 122, 92d Cong., 1st Sess., 119 Cong. Rec. No. 61, at H2877 (April 17, 1973); S. 1321, § 122, 93d Cong., 1st Sess., 119 Cong. Rec. No. 45 at S5373 (March 22, 1973).

VII.

As a constitutional barrier to the conclusion we reach, plaintiff argues that § 122 and 37 C.F.R. §§1.14 (b) and 1.108 are unconstitutional. The claim that 37 C.F.R. §§ 1.14(b) and 1.108 are invalid is derivative of the claim that § 122 is invalid insofar as it exempts abandoned applications from public disclosure, and plaintiff advances three distinct theories to arrive at that conclusion. A related argument is that the district judge should have convened a three-judge court to pass upon plaintiff's constitutional contentions rather than to have decided them himself. We agree with the district court that plaintiff's constitutional contentions are lacking in merit, and indeed are so insubstantial that it was unnecessary to convene a three-judge court pursuant to 28 U.S.C. § 2282 to reject them.[21] We turn to plaintiff's several arguments.

First, plaintiff relies upon Supreme Court decisions which say that the Patent Clause of Art. I is at once a conferral of power and a limitation upon the power conferred. Plaintiff contends that abandoned patent applications are evidence of the nature and scope of prior art and the level of ordinary skill therein, particularly when the Patent Office has rejected an application as not representing a significant advance over the prior state of the art at the time of the invention; and therefore a rule denying public access to abandoned patent applications prevents the efficient use of evidence material to the resolution of questions of patentability *in the constitutional sense.* It is argued that since the rule of secrecy is likely to lead to uncon-

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[21] *Ex parte Poresky*, 290 U.S. 30 (1930); *Bailey* v. *Patterson*, 369 U.S. 31 (1962); *Rosado* v. *Wyman*, 397 U.S. 397 (1970); *Maryland Citizens for A Rep. Gen. A.* v. *Governor of Md.*, 429 F.2d 606 (4 Cir. 1970).

stitutional adjudications that extend patent protection to inventions that are not patentable constitutionally, the secrecy rule is itself unconstitutional.

We do not agree. If Congress, in purported exercise of the Patent Power, attempts to extend patent protection to an item that is not a "discovery" within the meaning of the Patent Clause, such exercise of power would probably be unconstitutional. Although the Supreme Court does not appear to have invalidated any patent legislation on this theory, it seems clear that the Court believes that patentability standards such as non-obviousness—the requirement that the invention be "unobvious to one of ordinary skill in the art at the time it was made"—have a constitutional dimension.[22] But there are several answers to the contention. In the first place, 35 U.S.C. § 102 which specifies the type of prior art which will prevent issuance of a patent, or render an issued patent invalid, does not specify abandoned applications as "prior art." Brown v. Guild (The Corn Planter Patent), 90 U.S. 181, 210, 211 (1874), holds that an abandoned application, *per se,* cannot be the basis for holding a patent invalid because the application represents nothing more than an abandoned experiment. See also 1 Deller's Walker on Patents, 309 (1964). The rule has been criticized but not modified. Milburn Co. v. Davis Bournonville Co., 270 U.S. 390 (1926). But, where the concept of an abandoned application has been published or practiced so as to become "prior art," § 122 would not prevent a litigant in a suit over the validity of a patent from discovering any relevant and material abandoned patent applications. The exception in § 122 seems to be designed to meet this purpose.

[22] Graham v. John Deere Co., 383 U.S. 1 (1966); Anderson's Black Rock v. Pavement Salvage Co., 396 U.S. 57 (1969).

At best, full disclosure of abandoned patent applications would only facilitate the marshalling of evidence relevant to patentability that may be found in abandoned patent applications. Public disclosure of abandoned applications would probably permit the patent bar to develop expertise concerning what is contained in the mass of abandoned patents; patent attorneys might more readily be able to develop knowledge of what to look for and where to look for it under a system of public disclosure, in contrast to the present secrecy system where they must, indeed, start from scratch in their discovery in each case. But we doubt that the increased likelihood of correctness in adjudications about the validity of patents would be substantial. Furthermore, we do not think that a statute can be unconstitutional for no other reason than that it has some tendency to hamper the correct resolution of constitutional issues before the courts for adjudication.

Plaintiff's second constitutional theory relies upon the substantive due process clause of the fifth amendment. It is conceded that one of the purposes of the secrecy rule is to obviate the risk that, through publication, an applicant for a patent may lose rights arising under state trade secret law. Plaintiff says it is likely that many of the trade secrets embodied in abandoned patent applications are constitutionally unpatentable; and, if that be so, for the state to extend monopoly protection under its trade secret law to such inventions violates substantive due process.

The short answer to this argument is the recent decision in *Kewanee Oil Co.* v. *Bicron Corp., supra.* That case extended the holding in *Goldstein* v. *California,* 412 U.S. 546 (1973), that the power of Congress to protect writings by granting copyrights was not exclusive and that the states were not forbidden

to encourage and protect the writings of those within their borders, to intellectual property in inventions, i.e., trade secrets. *Kewanee* held that "[s]tates may hold diverse viewpoints in protecting intellectual property relating to invention as they do in protecting the intellectual property relating to the subject matter of copyright. The only limitation on the states is that in regulating the area of patents and copyrights they do not conflict with the operation of the laws in this area passed by Congress . . . ." —— U.S. at ——. Thus, the states may protect trade secrets, and we perceive no violation of the fifth amendment in federal forebearance to permit that power to be exercised.

Finally, plaintiff argues that neither Congress nor the Commissioner may validly assist patent applicants to preserve their state created trade secret rights in unpatentable ideas because of the Patent Clause of the Constitution. Again, the argument is that the states may not create trade secret rights in unpatentable ideas and that therefore Congress and the Commissioner may not assist private persons to maintain any such rights. Again the answer is *Kewanee*. The only possible constitutional bar to such state action stems, not from the Patent Clause, but from the Supremacy Clause. Any preemption of state authority is to be looked for, not in the constitutional grant of the Patent Power to Congress, but in the exercise of that power; and *Kewanee* holds that Title 35 does not of itself preempt state regulation and protection.

Since plaintiff's constitutional arguments are so insubstantial, we are satisfied that the district court had power, as a single judge, to decide her constitutional claims.

Affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-450

ALEXANDER P. BUTTERFIELD, ADMINISTRATOR OF THE FEDERAL AVIATION ADMINISTRATION, *ET AL.*,

Petitioners,

v.

REUBEN B. ROBERTSON, III AND JEROME B. SIMANDLE,

Respondents.

MEMORANDUM IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

QUESTION PRESENTED

Is a statute which permits any record in the possession of an agency to be withheld from disclosure, whenever the agency determines that disclosure is not required in the public interest, a statute which specifically exempts such records from disclosure within the meaning of 5 U.S.C. § 552(b)(3)?

STATEMENT OF THE CASE

The only question decided by the Court of Appeals for the District of Columbia Circuit, and the only one on which review is sought in this Court, is whether section 1104 of the Federal Aviation Act of 1958, 49 U.S.C. § 1504 (1970), is a statute which "specifically" exempts records from disclosure, within the meaning of exemption 3 to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(3) (1970). Section 1104 purports to allow withholding "of information contained in any application, report, or document filed pursuant to the provisions of this chapter or of information obtained by the [Civil Aeronautics] Board [the "CAB"] or the [Federal Aviation Administration (the "FAA") . . ." and thus, in effect, applies to any document in the possession of either agency. Upon the request of "any person," non-disclosure is permitted if it is determined in the "judgment" of the agency concerned that the "disclosure of such information would adversely affect the interests of [the person requesting non-disclosure] and [disclosure] is not required in the interest of the public." The Court of Appeals held that section 1104 was so open-ended a statute, both as to the documents covered by it and the absence of any standard beyond the "public interest" test for non-disclosure, that it was not a statute which "specifically" exempts records from disclosure within the purview of exemption 3. That decision is clearly correct, and there is no basis for this Court to review it.

This case originated in the summer of 1970 when respondents and others were engaged in a study of the FAA's administration of the laws relating to aviation safety. They requested access to various FAA documents, including the reports at issue here which are prepared under the

FAA's Systemsworthiness Analysis Program or "SWAP."[1] Under this program special teams of highly trained and experienced FAA inspectors make periodic examinations of the maintenance and safety operations of all U.S. certificated air carriers. These SWAP teams seek to identify significant failures and defects in the carriers' systems, procedures, recordkeeping, organization, training, and supervision, which may adversely affect compliance with applicable regulations and accepted standards of safety. The findings of the teams and their recommendations for corrective actions are then fully disclosed to the airline management in a special meeting held for that purpose, and a final SWAP report is prepared, containing those findings and recommendations.[2] It is these reports, which are the culmination of an effort by the FAA to improve air carrier safety by seeking to identify and cure problems before they result in accidents, which are sought in this proceeding.

Following petitioners' initial denial of respondents' request, an administrative appeal was filed in August 1970. While that appeal was pending, the Air Transport Association of America privately wrote the FAA on behalf of certain of the major airlines and requested that the SWAP reports be withheld from public disclosure pursuant to section 1104. On February 18, 1971, the FAA granted that

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[1] The SWAP program as in effect in November 1970 is described in FAA Systemsworthiness Analysis Program Handbook 8000.3B, which appears in the Joint Appendix in the Court of Appeals at pages 47-99 (hereinafter "JA").

[2] Their factual and analytical nature can be noted from the excerpts from an actual SWAP report submitted to the District Court (JA 39-41).

request and ordered that "all SWAP reports in existence or hereinafter to be made" shall be withheld from the public (JA 103).

Respondents had also unsuccessfully sought to obtain access to FAA documents known as Mechanical Reliability Reports (MRR's), which contain summaries of reports of serious mechanical malfunctions required to be submitted by the airlines to the FAA. These reports concern such problems as inflight fires and engine shutdowns, excessive cracks, corrosion, or structural damage, fuel leakage, and landing gear and other aircraft system malfunctions requiring emergency inflight action (JA 34-35). Although these reports are compiled by the FAA, printed at public expense, and mailed on a daily basis to a wide audience within the aviation industry, the FAA denied the request, initially because it lacked the consent of the Air Transport Association, and later because of its decision that the MRR's were exempt as "trade secrets and privileged or confidential information." In June 1971 this action was commenced, seeking both the SWAP reports and the MRR's. Thereafter, the FAA issued another *ex parte* determination at the request of the Air Transport Association, ruling that the MRR's, like the SWAP reports, were exempt from public disclosure on the authority of section 1104.

In defending this action in the District Court, petitioners claimed that both section 1104 and exemption 4 (trade secrets and confidential commercial or financial information) precluded disclosure of both the MRR's and the SWAP reports.[3] As to the SWAP reports, they also relied

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[3] 5 U.S.C. §552(b)(4) exempts ". . . trade secrets and commercial or financial information obtained from a person and privileged or confidential".

on exemptions 5 (intra-agency memoranda)[4] and 7 (investigatory files compiled for law enforcement purposes).[5] On cross motions for summary judgment, the District Court held that neither the MRR's nor the SWAP reports could be withheld, and that respondents were entitled to access to them on the same conditions as applied to persons in the airline industry (Pet. App. 19A-20A). Petitioners appealed only that part of the ruling relating to the SWAP reports.

In the Court of Appeals petitioners continued to press their claim that section 1104 was a statute which "specifically" exempts SWAP reports from disclosure under exemption 3, as well as their contention that exemptions 4, 5 and 7 entitled them to withhold the SWAP reports from respondents. The Court of Appeals, however, decided only the section 1104 issue, remanding the remainder of the case to permit the District Court to consider the effect of *Weisberg v. Department of Justice*, 489 F.2d 1195 (D.C. Cir. 1973) (en banc), an exemption 7 case, as well as "any other defense to disclosure [petitioners] may raise except Exemptions (1) and (3)" (Pet. App. 13A).

In ruling against petitioners on their claim that section 1104 is a statute which specifically exempts SWAP reports from disclosure, the Court of Appeals pointed to the absence of any clear definition or description of documents

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[4] 5 U.S.C. §552(b)(5) exempts ". . . inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

[5] 5 U.S.C. §552(b)(7) exempts " . . . investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency".

to be covered by it, in contrast to the "definite class of documents" withheld in *Environmental Protection Agency v. Mink*, 410 U.S. 73, 83 (1973) (Pet. App. 4A). It further noted that the Freedom of Information Act was intended to replace the public interest standard under the prior existing law, with a broad rule of disclosure subject to nine specific exemptions (Pet. App. 8A-9A). It reasoned that to import via section 1104 a public interest test to be applied at the discretion of the FAA and the CAB would frustrate the goals of the Freedom of Information Act. Based upon these reasons, the Court of Appeals concluded that section 1104 was not a statute which "specifically exempted" the SWAP reports, and thus exemption 3 did not apply (Pet. App. 5A, 12A).

THE QUESTION PRESENTED IS NOT APPROPRIATE FOR REVIEW BY THIS COURT.

The decision below is clearly correct, and the unstated premise of the petitioners – that Congress intended to allow the FAA and the CAB to use section 1104 to disregard the FOIA entirely – is untenable. Under the view advanced by petitioners, the FAA and the CAB, rather than Congress, could determine that any document in their possession could be withheld, unless disclosure was "required" in the public interest. This exemption from the FOIA for the aviation industry would be limited only to these two agencies, the FAA for safety and the CAB for economics, and would not apply to agencies regulating other modes of transportation such as automobiles, railroads, buses, and trucks. There is not the slightest reason advanced either in the petition, the legislative history of the FOIA, or elsewhere, to suggest any rationale for turning the FOIA's rule of disclosure on its head for the FAA and the CAB.

Exemption 3 of the Information Act excludes from disclosure "matters specifically exempted from disclosure by statute". The Court of Appeals found two basic defects in section 1104 which precluded it from coming within the ambit of exemption 3. First, the Court found that there was no adequate description of the class of documents covered, and second that section 1104 does not contain standards for the exercise of the judgment by the responsible agency official except for the generalized public interest test. As was noted in *Cutler v. Civil Aeronautics Board*, 375 F. Supp. 722, 724 (D.D.C. 1974), a case dealing with the authority of the CAB under section 1104, that statute would leave to the "virtually unbridled discretion" of the agency the decision as to whether to exempt a document, and hence it is not the statute but rather the agency, which controls disclosure, and this is contrary to the requirements of exemption 3.

In an attempt to rescue themselves from this situation, petitioners suggest that their actions would not be immune from judicial review but could be challenged in a Court of Appeals under 49 U.S.C. § 1486 (Pet. 16, n. 10). Quite apart from questions as to what the standard of review would be in such a proceeding, there is nothing to suggest why Congress would have wanted FOIA questions under section 1104 determined in a Court of Appeals, instead of in a District Court where the refusals of all other agencies to make disclosures are reviewed *de novo*. Furthermore, in cases such as this where there are other exemptions claimed, it would be necessary either to litigate those questions, which may include issues of fact,[6] in the Court of

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[6] Under the test established by the D.C. Circuit in determining whether information sought is "confidential" and either "commercial

(continued)

Appeals, or would require the bringing of two separate proceedings, one in the Court of Appeals with respect to section 1104, and another in the District Court for the remaining exemptions. Nothing in either the Federal Aviation Act or the Freedom of Information Act compels such a result, and there is no logical explanation to sustain it.

Contrary to the assertion of petitioners (Pet. 12-13), the decision below is not only consistent with the Court's ruling in *EPA v. Mink, supra,* but is fully supported by that decision. The class of documents covered in *Mink* – those "specifically required by Executive order to be kept secret in interest of the national security or foreign policy" – is entirely different from the open-ended provisions of section 1104 that apply to any application, report, document, or other information obtained by the FAA or the CAB. More importantly, this Court in *Mink* reviewed the legislative history of the predecessor to the Freedom of Information Act and pointed out that Congress had amended the law because the prior statute had been "plagued with vague phrases, such as that exempting from disclosure 'any function of the United States requiring secrecy in the public interest.'" *EPA v. Mink, supra,* 410 U.S. at 79. This Court then pointed out that the FOIA provisions "stand in sharp relief against those of §3 [the former law]" *id.*, and reasoned that the granting of nine specific exemptions was an attempt by Congress to strike a balance between the needs of secrecy and the desired goals of complete disclosure: "It is in the context of the Act's attempt to

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6 (continued) or financial," so that non-disclosure is warranted by exemption 4 (a defense also raised in *Cutler v. CAB, supra*), a factual record must be developed. See *National Parks and Conservation Ass'n v. Morton,* 498 F.2d 765, 770-771 (1974).

provide a 'workable formula' that 'balances, and protects all interests,' that the conflicting claims over the documents must be considered." *Id.* at 80.

As this Court noted in *Mink, id.* at 81-82, it was congressional criticism of the open-ended "public interest" exemption which was a strongly motivating factor leading to passage of the Freedom of Information Act. Yet it is that very kind of exemption that petitioners seek to reincorporate via section 1104. It is clear that in passing the FOIA Congress rejected the broad test of "public interest" as a basis for determining when there should be non-disclosure. Thus, it is almost inconceivable that Congress intended to allow the FAA and the CAB to continue using that standard under section 1104, particularly since there is no mention of such an intent in the legislative history, nor is there any suggested rationale for exempting these two agencies from the FOIA.

This case only presents a question as to the applicability of section 1104 to exemption 3 and, contrary to petitioners' assertion, does not present "an important and recurring question concerning the meaning of exemption 3 to the Freedom of Information Act" (Pet. 9). As petitioners concede, the restrictions contained in the statutes arguably within the ambit of exemption 3 are imposed in various ways, some providing for a mandatory and others providing for a discretionary non-disclosure. "They also vary with respect to the specificity of both the description of the material to be kept confidential and the basis upon which the government officials may disclose it" (Pet. 10). Given this range of statutes, the claimed applicability of exemption 3 should be considered on an individual basis, and therefore the only issue that would be resolved in this case is whether section 1104 comes within the third exemption.

As the petition points out, many of the other statutes have some but not all of the defects of section 1104, and the question of whether any single defect in a given statute is fatal to exemption 3 should be resolved in a case involving that statute, and not in this case which deals solely with section 1104.

Nor is there any "disagreement and uncertainty among the circuits" or any "confusion" regarding the effect of this decision on exemption 3, as alleged in the petition (page 17). For example, in *Stretch v. Weinberger*, 495 F.2d 639 (3rd Cir. 1974), a case cited by petitioners as a source of confusion, the analysis utilized was precisely the same as involved here. The Court stated that "the exempting statute must prescribe some basis upon which the Secretary is to decide. Otherwise there would be no escape from the unacceptable conclusion that the word 'specifically', as used in section 552(b)(3), is surplusage." *Id.* at 640. The Court went on to point out that both committees of Congress were concerned about the "recurring abuse of broad discretion," and that "the absence of standards to govern broad agency discretion was the chief evil at which Congress aimed." *Id.* at 641. That broad discretion is precisely the problem with section 1104, and nothing in *Stretch* is in any way inconsistent with the decision of the Court of Appeals below. We simply see no basis for the assertion of petitioners that the Third Circuit "is likely to hold that exemption 3 covers the documents involved in the present case. . ." (Pet. 17).

Nor are we able to understand the basis upon which the petitioners conclude that the Fourth Circuit "seemingly so indicated" in *Sears v. Gottschalk*, 502 F.2d 122 (1974), that the result in a section 1104 case in that Circuit would differ from that in the D.C. Circuit (Pet. 17).

The Court in *Sears* cited the Third Circuit's decision in *Stretch* with approval, noting both the emphasis in *Stretch* on the absence of statutory guidelines for the exercise of discretion and the necessity for a sufficient identification of the class of items Congress deemed appropriate for exemption (Pet. App. 29A-30A). The patent applications sought in *Sears* were specified in the relevant statute, 35 U.S.C. § 122, and thus were held to be exempt. Since that statute, which is very definite in its coverage, is so unlike the open-ended nature of section 1104, there is no basis to conclude that the *Sears* court would have reached a different result than did the lower courts here, if it had been considering section 1104.

Nor does the statement in *Sears*, based upon its reading of *Evans v. Department of Transportation*, 446 F.2d 821 (5th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972), that Congress had provided "some standards for the exercise of discretion" in section 1104 (Pet. App. 29A), alter this view. As the Fourth Circuit noted, the section 1104 exemption was only an alternative holding in *Evans*, and one which occupies barely half a page in the Federal Reporter. More importantly, that opinion never discussed the question of whether section 1104 was a statute covered by the third exemption but only ruled on whether the materials sought in *Evans* came within section 1104.[7] Finally, whatever the merits of the section 1104 claim are with

[7] Judged by the petition for certiorari in *Evans*, which dealt solely with whether the standards of section 1104 had been met (Petition in 71-698 at 15-16), and the opinion in the Fifth Circuit, it appears that Mr. Evans assumed that section 1104 was a statute covered by exemption 3 and that the arguments advanced here were never urged upon any court in that case.

regard to a single item of information submitted prior to the Freedom of Information Act, they simply have no bearing upon the intent by the Administrator here to shroud whole classes of past, present, and future SWAP reports with a veil of secrecy under the aegis of section 1104.

There is one further reason why review is inappropriate at this time. In addition to their claims of section 1104, petitioners have asserted that the fourth, fifth, and seventh exemptions to the FOIA also support their withholding of the SWAP reports.[8] The Court of Appeals did not rule upon these claims, but remanded to the District Court for further consideration in light of the decision in *Weisburg v. Department of Justice*, 489 F.2d 1195 (D.C. Cir. 1973) (*en banc*). Thus, disclosure of these documents is nowhere near imminent, and there are three other defenses which may protect petitioners and render moot the claim that section 1104 is needed to protect vital interests of the FAA. Moreover, the fact that petitioners have claimed these other exemptions demonstrates that Congress could not have intended to superimpose section 1104 on top of all of the other exemptions that it had so carefully written into the law. All of the legitimate interests requiring secrecy have been amply protected by the nine specific exemptions enumerated in section 552(b), and there is no reason to conclude that Congress intended to establish in the FAA and CAB the right to administer mini-Freedom of Information Acts and to decide for themselves what is in the public interest and what should not be disclosed.

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[8] In the only other reported cases involving section 1104, *Evans v. DOT*, *supra*, and *Cutler v. CAB*, *supra*, the agency also claimed the applicability of exemptions 7 and 4, respectively.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

ALAN B. MORRISON
LARRY P. ELLSWORTH

Suite 700
2000 P Street, N.W.
Washington, D.C.
(202) 785-3704

Attorneys for the Respondents

November, 1974

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-450

ALEXANDER P. BUTTERFIELD, ADMINISTRATOR OF THE FEDERAL AVIATION ADMINISTRATION, ET AL., PETITIONERS

v.

REUBEN B. ROBERTSON, III and JEROME B. SIMANDLE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR PETITIONERS

1. Respondents have made no attempt to refute the extensive legislative history, discussed in the petition (pp. 13-15), demonstrating that, in exemption 3 of the Freedom of Information Act, Congress intended to preserve intact the numerous previously enacted statutes providing for confidential treatment of material in the government's possession. Instead, they attempt to minimize the importance of the case, suggesting that it "only presents a question as to the applicability of section 1104 to exemption 3" (Br. in Opp. 9). But the issue presented in our petition broadly involves the scope of exemption 3 itself and not merely its application to the particular confidentiality statute involved in this case.

The question we are asking the Court to decide is whether exemption 3 applies to all specific nondisclosure statutes, as we submit Congress intended, or whether it covers only certain nondisclosure statutes which are to be identified under judicially created standards, as the court of appeals held in this case. If our view of exemption 3 is sustained in this case, it will largely resolve the issue of its application to the nearly 100 statutes which provide in various ways for the confidential treatment of government material (see Pet. 9). In any event, this Court's interpretation of exemption 3 will provide standards and guidance to the courts of appeals in resolving the substantial and apparently growing volume of litigation under that provision.

2. The confusion and uncertainty among the circuits over the meaning of exemption 3, which we discussed in our petition (Pet. 16-17), has been increased by the recent decision of the Court of Appeals for the Ninth Circuit in *People of California* v. *Weinberger*, No. 73-1494, decided November 7, 1974, subsequent to the filing of our petition. Contrary to *Schechter* v. *Weinberger*, No. 73-1797, decided October 3, 1974 (C.A.D.C.), *Stretch* v. *Weinberger*, 495 F. 2d 639 (C.A. 3) and *Serchuk* v. *Weinberger*, 493 F. 2d 663 (C.A. 5), *People of California* holds that 42 U.S.C. 1306(a) is a statute that specifically exempts material from disclosure, within the meaning of exemption 3.[1] (The opinion is set forth in the appendix hereto.)

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[1]The government does not intend to petition for a writ of certiorari in *Serchuk* or *Schechter*, since we have been advised that the Department of Health, Education and Welfare is planning to issue proposed regulations, pursuant to the specific authority in 42 U.S.C. 1306(a), which will authorize disclosure of the materials being sought in those cases. If those regulations are adopted, the cases will become moot.

3. The respondents contend that review is not appropriate at this time because the court of appeals has remanded the case to the district court to consider three other exemptions in the Freedom of Information Act upon which the government has also relied (exemptions 4, 5 and 7) (Br. in Opp. 12). Review is warranted now, however, because in this decision the court of appeals has rendered a definitive interpretation of exemption 3, which will control its meaning in the District of Columbia Circuit, where a major portion of all Freedom of Information Act litigation takes place.[2] The rulings of the district court on remand on the other exemptions will not clarify or sharpen the exemption 3 issue here presented.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1974.

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[2]As we noted in our petition (p. 11), the presence of most agencies in the District of Columbia makes the views of that Circuit Court of Appeals of special importance. Indeed, more than half of all Freedom of Information Act cases are brought in the District of Columbia. (Thus 51 of the 91 Freedom of Information Act cases handled by the Civil Division on November 1, 1974 were filed in the District.)

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PEOPLE OF THE STATE OF CALIFORNIA, acting by and through EVELLE J. YOUNGER as Attorney General of California; CALIFORNIA LEGISLATIVE COUNCIL FOR OLDER AMERICANS; SAN FRANCISCO CHAPTER OF THE CALIFORNIA LEGISLATIVE COUNCIL FOR OLDER AMERICANS; and YOUNG PEOPLE FIFTY AND OVER, unincorporated associations,
Plaintiffs-Appellants,

v.

CASPAR W. WEINBERGER, as Secretary of the United States Department of Health, Education, and Welfare; and MERCIA L. KAHN, as Regional Representative of the Bureau of Health Insurance, United States Department of Health, Education, and Welfare,
Defendants-Appellees.

No. 73-1494

OPINION

Filed November 7,

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Before: DUNIWAY and TRASK, Circuit Judges, and SMITH*, District Judge

SMITH, District Judge.

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*The Honorable Russell E. Smith, Chief Judge of the United States District Court for the District of Montana, sitting by designation.

Appellants, relying on the Freedom of Information Act (5 U.S.C. §552), sought the disclosure of "Extended Care Facility Survey Reports" which were in the custody of the Secretary of Health, Education and Welfare. These are reports by which state agencies annually inform the Secretary about the performance of nursing and old-age homes which receive federal funds under the Medicare program. The Secretary refused to disclose. Appellants brought an action to compel disclosure. 5 U.S.C. §552(a)(3). The district court denied relief and this appeal followed.

The Freedom of Information Act requires the disclosure of the records of federal agencies but provides for exceptions, one of which is:

> "(b) This section does not apply to matters that are—
>
> * * *
>
> (3) specifically exempted from disclosure by statute;"

The question posed is whether 42 U.S.C. §1306(a) relating to disclosure of Health, Education and Welfare records, reading in part,

> No disclosure of any . . . report . . . obtained at any time by the Secretary . . . or by any officer or employee of the Department . . . in the course of discharging their respective duties under this chapter [the chapter on social security] shall be made except as the Secretary . . . may by regulations prescribe . . . ,

specifically exempts from disclosure the reports here sought.

The question has been answered both ways. The case of *Stretch* v. *Weinberger*, 495 F. 2d 639 (3d Cir. 1974), held that these reports were not exempted from disclosure. The dissenting opinion[1] of Judge MacKinnon in *Schechter v. Weinberger*, 498 F. 2d 1015 (D.C. Cir. 1974), reached the opposite conclusion. We agree with Judge MacKinnon. To us his analysis of *Stretch v. Weinberger, supra,* and his analysis of legislative history of 42 U.S.C. §1306, including the Social Security Amendments of 1972 (86 Stat. 1428, 1461-1462 (1972)), are persuasive.

To what Judge MacKinnon has said we add these observations: It appears to us that when Congress used the word "specifically" it was requiring no more than that the exemption be found in the words of the statute rather than the implication of it. If an act were to exempt "all records" of a given agency, we believe that "all records" would be specifically exempted even though they were not described with "some degree of particularity." This view is contrary to the one expressed in *Stretch*.

We do not believe that Section 1306 was an "authorization for administrative exemption,"[2] but if we did we would agree with the conclusion reached in *Stretch*. We think the words of Section 1306, "no disclosure . . . shall be made," are words of congressional exemption which prohibit disclosure and that the words "except as the Secretary . . . may by regulation prescribe" are words allowing the Secretary to relax the absolute prohibition established by Congress. We realize that as a practical matter there may not be much difference in effect between a congressional exemption with power in the Sec-

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[1]The majority opinion did not reach the question.

[2]This seems to have been the Secretary's argument in the *Stretch* case. See *Stretch v. Weinberger, supra,* at 640.

retary to relax it and a congressional authorization of administrative exemption. Where, however, as here, we seek the meaning of congressional language, particularly the words "specifically exempted from disclosure by statute," there is a real difference between a statute in which the congressional words themselves prohibit disclosure and a statute which authorizes an administrator to exempt from disclosure. In the latter case the exemption is the creature of the administrator and does not fall within the meaning of the words "specifically exempted . . . by statute."

The judgment is affirmed.

DUNIWAY, Circuit Judge, dissenting:

I would reverse the judgment in this case. The question presented is not an easy one, but I believe that the court in *Stretch v. Weinberger*, 3 Cir., 1974, 495 F. 2d 639, correctly construes the Freedom of Information Act and 42 U.S.C. §1306(a). *See also Serchuk v. Weinberger*, 5 Cir., 1974, 493 F. 2d 663, which follows *Stretch, supra; Schechter* v. *Weinberger*, D.C. Cir., 1974, F. 2d (No. 73-1797, October 3, 1974). *Cf. Robertson v. Butterfield*, D.C. Cir., 1974, 498 F. 2d 1031. In my opinion, *Environmental Protection Agency v. Mink*, 1973, 410 U.S. 73, does not require affirmance in this case. It dealt with a different exemption, and see the Court's comment at p. 80 and fn. 6. I do not find Judge MacKinnon's dissent in *Schechter v. Weinberger*, D.C. Cir., 1974, 498 F. 2d 1015, as persuasive as my brothers do.

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-450

ALEXANDER P. BUTTERFIELD, ADMINISTRATOR OF THE FEDERAL AVIATION ADMINISTRATION, ET AL., PETITIONERS

v.

REUBEN B. ROBERTSON, III AND JEROME B. SIMANDLE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1A–16A) is reported at 498 F.2d 1031. The order of the district court (Pet. App. C, pp. 19A–20A) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, pp. 17A–18A) was entered on May 9, 1974. A timely petition for rehearing was denied on July 11, 1974 (Pet. App. D, p. 21A). On October 4, 1974, the Chief Justice extended the time to petition for a writ

of certiorari to October 19, 1974. The petition was filed on October 18, 1974, and was granted on December 16, 1974. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Exemption 3 of the Freedom of Information Act provides for nondisclosure of "matters that are specifically exempted from disclosure by statute." The question is whether this exemption covers all material with respect to which Congress by statute has provided for nondisclosure upon various terms, including statutes that give government officials discretion to decide whether to disclose.

STATUTES INVOLVED

The Freedom of Information Act, as amended, 5 U.S.C. 552, provides in pertinent part:

> Section 552. *Public information; agency rules, opinions, orders, records, and proceedings.*
>
> (a) Each agency shall make available to the public information as follows:
>
> * * * * *
>
> (3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed,

shall make the records promptly available to any person.[1]

* * * * *

(b) This section does not apply to matters that are—

* * * * *

(3) specifically exempted from disclosure by statute;

* * * * *

Section 1104 of the Federal Aviation Act of 1958, 72 Stat. 797, 49 U.S.C. 1504, provides:

> Any person may make written objection to the public disclosure of information contained in any application, report, or document filed pursuant to the provisions of this chapter or of information obtained by the Board or the Administrator, pursuant to the provisions of this chapter, stating the grounds for such objection. Whenever such objection is made, the Board or Administrator shall order such information withheld from public disclosure when, in their judgment, a disclosure of such information

[1] This section was amended by the 1974 Amendments to the FOI Act, Pub. Law 93–502, 88 Stat. 1561. Prior to the amendments, Section 552(a)(3) read, in pertinent part:

"Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. * * *"

The amendments did not affect exemption 3 of the Act, 5 U.S.C. 552(b)(3).

would adversely affect the interests of such person and is not required in the interest of the public. The Board or Administrator shall be responsible for classified information in accordance with appropriate law: *Provided,* That nothing in this section shall authorize the withholding of information by the Board or Administrator from the duly authorized committees of the Congress.

STATEMENT

1. In this suit the respondents seek, under the Freedom of Information Act (FOI Act), 5 U.S.C. 552, reports prepared by the Federal Aviation Administration (FAA) in connection with its Systemsworthiness Analysis Program (SWAP). This program, which supplements the FAA's ordinary surveillance of airlines, consists of in-depth studies by FAA investigative teams of broad areas of airlines' operations and is intended to prevent unsafe conditions from arising.[2]

[2] The FAA instituted the program on July 1, 1966 with the inspection of air carriers and on October 1, 1969, the program was expanded to cover the general aviation industry (A. 41). The current FAA SWAP handbook defines the program as follows (FAA Order 8000.3C, ¶ 1; A. 127, 218):

"The Flight Standards Systemsworthiness Analysis Program is a systems approach to fulfill agency responsibilities for inspection and surveillance of operators having formalized systems that cannot be monitored effectively using customary surveillance techniques. It is aimed at determining the causal factors which allow a system to deteriorate rather than the symptoms that are a result of such deterioration. The task of the SWAP team is to supplement the process of surveillance with an indepth analysis of operators' systems and subsystems to determine if system objectives are being achieved."

As the affidavit of the former Federal Aviation Administrator in this case stated, the "investigative team works in close cooperation with airline management to find any area of maintenance, operations, management, or overall performance which needs improvement" and, thus, "[t]he system depends upon the frank and full disclosure of the airline" (A. 40).[3]

A SWAP investigation results in a report for the use of FAA officials, setting out the team's findings, discussions and recommendations concerning the systems inspected (A. 135–140).[4] "Information investigated and discussed in a SWAP inspection," according to the former Administrator, "includes financial and operational matters which would not customarily be released to the public," as well as material "which would not be disclosed to competitors" (A. 40). The SWAP program, therefore, "operates with the understanding between the airlines and the FAA that the information will not be disclosed to the public" (A. 41).

Following the SWAP inspection, the SWAP team and other FAA officials meet with the operator to dis-

[3] The SWAP handbook states (FAA Order 8000.3C, ¶ 105; A. 133, 254):

"In cases where a problem area is suspected to exist, it should be frankly discussed with the operator. This straight-forward approach will help to foster a feeling of mutual trust and respect that is beneficial, if not essential, to the analysis. * * * The operator should be invited to stipulate any special areas that he would like the team to examine."

[4] Change 3 to FAA Order 8000.3C, dated July 24, 1974, amended the instructions for the preparation of SWAP reports (A. 226–250). The change, however, related principally to the use of a form for the first and last pages, and the instructions concerning the contents of the report were not substantially modified by the change (see A. 233–239, 249).

cuss the team's findings.[5] FAA Order 8000.3C, ¶ 107 (A. 135, 255). In order that the operator may intelligently discuss the team's findings at the post-inspection meeting, the findings and discussion portion of the SWAP report may be furnished to the operator (A. 42). The FAA does not make information from the reports available to the Air Transport Association or to any operator other than the one being inspected (A. 42).

2. In August, 1970, respondents requested the FAA to produce the SWAP reports for the year 1969, and when the request was denied, the respondents, on August 26, 1970, sought reconsideration of the denial (A. 6).[6] Thereafter, the Air Transport Association, on behalf of 28 airlines, requested the FAA (A. 112–114) to withhold the reports from disclosure pursuant to Section 1104 of the Federal Aviation Act, 49 U.S.C. 1504. Section 1104 (*supra*, pp. 3–4) provides that the Federal Aviation Administrator or the Civil Aeronautics Board, upon written objection to the disclosure of information obtained pursuant to the Act, may withhold such information "when, in their judgment, a disclosure of such information would adversely affect the interests of such person and is not required in the interest of the public."

In objecting to disclosure of the SWAP reports, the Air Transport Association stated that "[i]nfor-

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[5] The SWAP report is provided to the FAA district office chief and/or the principal inspectors who have responsibility for determining what corrective action is to be taken. FAA Order 8000.3C, ¶ 50 (A. 186, 219).

[6] Although the respondents initially requested that the FAA produce only the SWAP reports for 1969, this suit seeks the disclosure of all SWAP reports (A. 15, 29).

mation freely given to the FAA SWAP team by the air carrier management personnel is not specifically required by the [Federal Aviation Regulations]" and that "[t]he present practice of non-public submissions * * * encourages a spirit of openness on the part of airline management which is vital to the promotion of aviation safety" (A. 112). The Association concluded that "[i]f public disclosure of the SWAP reports were made, the interests of aviation safety would be in danger of being subordinated in some degree to legal considerations in the presentation of information to the FAA" (A. 112).

The Administrator decided to withhold the SWAP reports from public disclosure because the "disclosure of the information contained therein would adversely affect the interests of the airline being investigated and is not required in the interest of the public" (A. 115).

The FAA advised respondents of the Administrator's determination under Section 1104, explaining that the SWAP reports were therefore "matters that are specifically exempted from disclosure by statute" under exemption 3 of the FOI Act, 5 U.S.C. 552(b)(3) (A. 29). The FAA further stated that the reports were exempted from disclosure under exemptions 4, 5 and 7 of the Act, 5 U.S.C. 552(b)(4), (5) and (7) (A. 29–33).

The respondents then filed their complaint in the district court, seeking in count one the disclosure of all SWAP reports (A. 4–17).[1] The FAA responded

[1] The complaint contained seven counts. Counts two through six alleged improper administrative action or procedures. Count seven alleged a violation of the anti-trust laws and joined the

that the SWAP reports were exempted from disclosure under exemption 3 of the FOI Act by virtue of Section 1104.[8] The district court held, however, that the SWAP reports were "public and non-exempt" (Pet. App. C, p. 20A).[9]

On appeal, the court of appeals, in a 2–1 decision, held that the SWAP reports were not exempt pursuant to exemption 3 and remanded the case for consideration of other exemptions the FAA may wish to assert (Pet. App. A, pp. 1A–16A). The court stated that "[t]he ordinary meaning of the language of Exemption (3) is that the statute therein referred to must itself specify the documents or categories of documents it authorizes to be withheld from public scrutiny," and that "Section 1104 of the Aviation Act fails to do this" (Pet. App. A, p. 4A). The court concluded that since the SWAP reports "did not fall within any congressionally specified statutory category * * * [i]t would be unacceptable to hold that

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Air Transport Association as a defendant. The Air Transport Association's motion to dismiss count seven was granted, as was the federal defendants' motion to dismiss counts two through six (Pet. App. C, p. 20A; A.2). The respondents did not appeal those rulings.

[8] The FAA also relied upon exemptions 4, 5 and 7 of the FOI Act, 5 U.S.C. 552(b)(4), (5) and (7) (A. 38).

[9] Respondents also sought disclosure of Mechanical Reliability Reports (MRRs). MRRs are daily reports of mechanical malfunctions which are submitted to the FAA by aircraft operators. While he had previously declined to disclose MRRs, on January 11, 1972, the Administrator directed disclosure of MRRs received after February 18, 1972. The district court's subsequent order in this case, on November 8, 1972, ordered disclosure of MRRs received prior to February 18, 1972. Petitioners did not contest this aspect of the district court's order on appeal.

[the Administrator's] conclusion that disclosure of any and all of the reports requested would adversely affect the interests of each airline covered, and is not required 'in the interest of the public,' is a specific exemption by section 1104" (Pet. App. A, pp. 4A–5A; footnote omitted).

The court, noting that Section 1104 of the Federal Aviation Act contains a "public interest" standard, stated that the subsequently enacted FOI Act provided "the guide to the congressional intent with respect to the public interest" (Pet. App. A, p. 11A). Because the FOI Act intended to eliminate from the Public Information Section of the Administrative Procedure Act such guidelines as "in the public interest," the court concluded that "the public interest standard of section 1104 is not a specific exemption by statute within the meaning of Exemption (3)" (Pet. App. A, pp. 9A, 11A–12A).

Judge Robb dissented. He cited legislative history explaining that exemption 3 was designed to assure that the numerous previously enacted nondisclosure statutes would not be modified by the Freedom of Information Act. He concluded that "Section 1104 is tailored to the needs and problems of the Federal Aviation Administration" and was not "overridden or repealed by the general terms of the Freedom of Information Act" (Pet. App. A, p. 16A).

SUMMARY OF ARGUMENT

1. When the Freedom of Information Act was passed, there were nearly 100 statutes in effect which provided for confidential treatment of government information. In exemption 3 Congress intended to con-

tinue the effectiveness of those provisions. That exemption, which exempts from disclosure "matters that are specifically exempted from disclosure by statute," covers all statutes that specifically require or permit nondisclosure of government information, without regard to the circumstances in which such nondisclosure is provided.

Contrary to the ruling of the court of appeals, the application of exemption 3 is not limited to statutes that specify the documents which are to be kept confidential. This Court's decision in *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, concerning exemption 1, which is structured similarly to exemption 3, shows that exemption 3 is not limited to nondisclosure statutes which specify the documents to be withheld. In *Mink*, this Court rejected an argument that exemption 1, which protected matters "specifically required by Executive order to be kept secret," is applicable only where an executive order specified the documents to be withheld.

2. The legislative history of exemption 3 confirms that the exemption covers all statutes that require or authorize nondisclosure, whether or not they specify the particular documents to be kept confidential. The 1966 House Report stated that there are "nearly 100 statutes or parts of statutes which restrict public access to specific Government records" and that "[t]hese would not be modified" by the FOI Act. H. Rep. No. 1497, 89th Cong., 2d Sess., p. 10. Similar statements in the legislative history of preceding bills

show that exemption 3 was intended to cover all nondisclosure statutes, including those that make confidential treatment of information discretionary with government officials. Thus the only inquiry a court is to make in applying exemption 3 is whether there is a specific statute requiring or authorizing nondisclosure.

3. Section 1104 of the Federal Aviation Act is a statute which "specifically exempts[s]" from disclosure matters that it covers. It permits the Civil Aeronautics Board or the Federal Aviation Administrator to withhold material from disclosure if its production would adversely affect the interests of the person seeking confidential treatment and "is not required in the interest of the public." 49 U.S.C. 1504. One strong indication that Section 1104 was among the nondisclosure statutes Congress intended to preserve in enacting exemption 3 is the fact that it was specifically mentioned in a list of nondisclosure statutes submitted to Congress during the 1958 hearings on Freedom of Information bills.

The holding of the court of appeals that Section 1104 is outside the scope of exemption 3 would thus nullify a large number of statutes which Congress intended to preserve and would thus defeat the congressional policy underlying exemption 3. Moreover, the nullification of Section 1104 would impair the Federal Aviation Administration's ability properly to perform its investigative functions.

ARGUMENT

THE SWAP REPORTS ARE EXEMPT FROM DISCLOSURE UNDER EXEMPTION 3 OF THE FREEDOM OF INFORMATION ACT SINCE THEY ARE MATTERS THAT ARE "SPECIFICALLY EXEMPTED FROM DISCLOSURE BY STATUTE"

When the FOI Act was enacted, there existed numerous statutes that restricted disclosure of government information in various ways. Those statutes, most of which have not been expressly repealed, provide for either mandatory [10] or discretionary nondisclosure of information. Note, *Freedom of Information: The Statute and the Regulations,* 56 Geo. L. J. 18, 33–34 (1967).

The discretionary statutes differ widely. They range from those, like 42 U.S.C. 1306,[11] which provide for the nondisclosure of information unless government officials authorize disclosure, to those, like Section 1104, which permit disclosure unless government officials determine that the material should be kept confidential. They also vary with respect to the specificity of both the description of the material to be kept confidential and the basis upon which government

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[10] An example of a mandatory nondisclosure statute is 22 U.S.C. 987, which provides that correspondence and records of the State Department relating to the officers and employees of the Foreign Service are confidential and subject to inspection only by certain specified government officers.

[11] 42 U.S.C. 1306(a) provides in pertinent part:

"No disclosure of any * * * report * * * obtained at any time by the Secretary of Health, Education and Welfare * * * or by any officer or employee of the Department * * * in the course of discharging their respective duties under this chapter * * * shall be made except as the Secretary * * * may by regulations prescribe."

officials may disclose it.[12] By exemption 3, Congress intended to continue the effectiveness of all existing nondisclosure provisions.

A. EXEMPTION 3 COVERS ALL STATUTES THAT REQUIRE OR PERMIT NONDISCLOSURE OF GOVERNMENT INFORMATION

Exemption 3 of the FOI Act (5 U.S.C. 552(b)(3)) exempts from compelled public disclosure "matters that are specifically exempted from disclosure by statute." By its terms, the exemption extends to all cases where a right to withhold from disclosure is created by statute, in contrast to cases where it is merely implied from legislation or asserted without specific statutory authority on the basis of a judgment that disclosure would not be appropriate. As the Court of Appeals for the Ninth Circuit said in *People of California* v. *Weinberger,* 505 F. 2d 767, 768 (Reply Memo, App., p. 6): "It appears to us that when Congress used the word 'specifically' it was requiring no more than that the exemption be found in the words of the statute rather than the implication of it."[13]

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[12] For example, 35 U.S.C. 122 provides that information in patent applications cannot be made public by the Patent Office "unless necessary to carry out the provisions of any Act of Congress or in such special circumstances as may be determined by the Commissioner."

38 U.S.C. 3301 states that all files, records, and other papers pertaining to any claim under any law administered by the Veterans' Administration are not to be disclosed except that "[t]he Administrator may release information * * * when in his judgment such release would serve a useful purpose."

[13] Commentaries on exemption 3 have expressed the view that discretionary nondisclosure statutes are within its coverage. *Developments Under the Freedom of Information Act—1972,* 1973 Duke L. J. 157, 192–194; Note, *supra,* 56 Geo. L. J. at 33–34.

The language of exemption 3 does not limit the exemption to statutes which make nondisclosure mandatory, and does not exclude statutes which authorize the government to exercise discretion in the disclosure of information.[14] Contrary to the view of the court of appeals (Pet. App. A, p. 4A), nothing in the wording of exemption 3 indicates or suggests that the statute which "specifically exempt[s]" matters from disclosure must specify the particular documents or categories of documents to be withheld.

The conclusion of the court of appeals that exemption 3 covers only nondisclosure statutes that themselves specify the documents to be withheld is inconsistent with this Court's interpretation of another similarly structured exemption to the Act in *Environmental Protection Agency* v. *Mink*, 410 U.S. 73. That case involved exemption 1, which exempts from disclosure matters "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." 5 U.S.C. 552(b)(1). The Executive Order involved in *Mink*, No. 10501, did not refer, "specifically" or otherwise, to the six documents at issue in that case. Rather, that Executive Order, like Section 1104, merely delegated to executive officials the authority to determine which documents were to be withheld from public scrutiny. Executive Order 10501, 3 C.F.R. (Jan. 1, 1970 rev.) 280.

[14] Nondisclosure of information based upon a discretionary statute is, of course, based upon congressional authority, just as is the withholding of information pursuant to a mandatory nondisclosure statute. *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 82, n. 8.

This Court rejected the argument that "classification of material under Executive Order 10501 is somehow insufficient for Exemption 1 purposes, or that the exemption contemplates the issuance of orders, under some other authority, for each document the Executive may want protected from disclosure under the Act" (410 U.S. at 83). Similarly, there is nothing in exemption 3 that limits its coverage to statutes that "specify the documents or categories of documents it authorizes to be withheld from public scrutiny" (Pet. App. A, p. 4A).[15]

The court of appeals sought to distinguish *Mink* on the ground that this Court construed exemption 1 in *Mink* "to be a specific reference by Congress itself to a definite class of documents which were not to be disclosed" (Pet. App. A, p. 4A). However, as noted, exemption 1 merely refers to "matters that are specifically required by Executive Order to be kept secret" and does not refer to a "definite class of documents." By the same token, exemption 3 refers to "matters that are specifically exempted from disclosure by statute" and does not refer to a "definite class of documents."

Thus, under exemption 3 the only function of a reviewing court is to determine whether there is a specific statute requiring or authorizing the confidentiality of the material involved. This was the

[15] Mr. Justice Stewart, concurring in *Mink*, noted that exemption 3, like exemption 1, is "[s]imilarly rigid" and that "the only 'matter' to be determined in a district court's *de novo* inquiry [under exemption 3] is the factual existence of * * * a statute, regardless of how unwise, self-protective, or inadvertent the enactment might be" (410 U.S. at 95, note).

approach taken by the court of appeals for the Fifth Circuit in *Evans* v. *Department of Transportation*, 446 F. 2d 821, certiorari denied, 405 U.S. 918. That court seemingly—and correctly—viewed its role as limited to ascertaining whether there was a statute providing for confidential treatment.

In *Evans*, the Federal Aviation Administration received a letter describing Evans' alleged mental disorders affecting his qualification as a commercial pilot, but not identifying Evans by name. The correspondent refused to name Evans until he had been assured in writing that his letter would be kept confidential. 446 F.2d at 823. The court of appeals, as an alternative ground for holding that Evans could not obtain the letters under the Freedom of Information Act, ruled that exemption 3 covered the letters. Noting that exemption 3 covers "matters that are specifically exempted from disclosure by statute," it ruled that, since the identity of Evans had been given under "assurances of complete non-disclosure," Section 1104 covered the situation. The Court of Appeals for the Fifth Circuit, thus, apparently concluded that since there was a statute authorizing the nondisclosure of information, that ended the inquiry.[16]

[16] Courts of appeals which have departed from the limited inquiry whether there is a specific exemption statute have reached a variety of contradictory results.

Thus, in *Stretch* v. *Weinberger*, 495 F. 2d 639, holding that exemption 3 does not apply to documents covered by 42 U.S.C. 1306(a) (*supra*, n. 11), the Court of Appeals for the Third Circuit ruled that for a statute providing for confidentiality to be within exemption 3, it must "prescribe some basis upon which the [agency] is to decide" whether to disclose material, namely, it must prescribe "standards or guides

B. THE LEGISLATIVE HISTORY OF THE FREEDOM OF INFORMATION ACT SHOWS THAT CONGRESS INTENDED IN EXEMPTION 3 TO CONTINUE THE EFFECTIVENESS OF THE MANY STATUTES THAT THEN PROVIDED FOR CONFIDENTIAL TREATMENT

The legislative history of exemption 3 shows that Congress was aware of the numerous existing nondisclosure statutes and intended to preserve all of them, whatever their terms, which specifically provided for confidential treatment of information in the possession of the government.

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through which legislative judgment would be reflected in the making of administrative exemptions" (495 F. 2d at 640).

Schechter v. *Weinberger*, C.A.D.C., No. 73–1797, decided October 3, 1974, and *Serchuk* v. *Weinberger*, 493 F. 2d 663 (C.A. 5), which also involved 42 U.S.C. 1306(a), reached the same result. Judge MacKinnon dissented in *Schechter* on the ground that Congress was "well aware of the existence of statutes such as 1306" and that "[i]f Congress had not intended to include this statute within Exemption Three, it could easily have done so either by explicitly narrowing the coverage of the exemption or by amending Section 1306" (498 F. 2d 1015, 1016). See also 1973 Duke L. J., *supra*, at 193–194.

The Court of Appeals for the Fourth Circuit in *Sears* v. *Gottschalk*, 502 F. 2d 122, certiorari pending, No. 74–584, which involved a denial, pursuant to 35 U.S.C. 122 (*supra*, n. 12), of a request for abandoned patent applications, agreed with the interpretation of exemption 3 in *Stretch*, but concluded that the material was, nevertheless, exempted from disclosure by exemption 3.

The Court of Appeals for the Ninth Circuit in *People of California* v. *Weinberger*, 505 F. 2d 767 (Reply Memo, App., p. 4), held, contrary to *Stretch*, that material covered by 42 U.S.C. 1306(a) is exempted from disclosure by exemption 3. The court distinguished between "a statute in which the congressional words themselves prohibit disclosure," which the court believed was within exemption 3, and "a statute which authorizes an administrator to exempt from disclosure," which it concluded was outside of the exemption (Reply Memo, App., p. 7).

In explaining exemption 3, the 1966 House Report stated that there are "nearly 100 statutes or parts of statutes which restrict public access to specific Government records. These would not be modified by the public records provision of S. 1160."[17] H. Rep. No. 1497, 89th Cong., 2d Sess., p. 10.[18] This interpretation of the exemption was in accord with numerous prior expressions of congressional intent, made during the legislative consideration of the predecessor bills to the statute actually enacted, to preserve previously enacted nondisclosure statutes.[19]

Thus, during the 1963 Senate Hearings, Senator Long, the Chairman of the Senate Subcommittee, and a leading proponent of the FOI Act, stated (Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, on S. 1666 and S. 1663 (in part)[20] (Freedom of

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[17] S. 1160 is the Senate Bill which was enacted as the FOI Act.

[18] The *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* (June 1967), pp. 31–32, after noting that there are statutes "which specifically exempt from disclosure, prohibit disclosure except as authorized by law, provide for disclosure only as authorized by law, or otherwise protect from disclosure," concluded that the reference in the House Report to "nearly 100 statutes" "indicates an intention to preserve whatever protection is afforded under other statutes, *whatever their terms*" (emphasis added).

[19] The Senate Report on S. 1160 does not contain an explanation of exemption 3. S. Rep. No. 813, 89th Cong., 1st Sess.

[20] Although the structure of S. 1160 was modified from that of S. 1666, the language of exemption 3 in both bills is the same. See Note, *Comments on Proposed Amendments to Section 3 of the Administrative Procedure Act: The Freedom of Information Bill*, 40 Notre Dame Law. 417, 437–438, n. 142, 443, n. 179 (1965).

Information), 88th Cong., 1st Sess., p. 6):

> Section 3(e) of S. 1666 states that nothing in this section authorizes the withholding of information nor the limiting of public access to records except as specifically described in the measure. * * * *Statutes which curtail the availability of information to the public are not intended to be affected by the enactment of this bill.* They provide that specified records shall not be released unless authorized by law. Subsection 3(e) is not such an authorization to disclosure. It should be made clear that *this bill in no way limits statutes specifically written with the congressional intent of curtailing the flow of information* as a supplement necessary to the proper functioning of certain agencies.[21] [Emphasis added.]

The 1964 Senate Report on S. 1666 similarly stated (S. Rep. No. 1219, 88th Cong., 2d Sess., p. 12):

> Exception No. 3 relates to matter which "is specifically exempted from disclosure by statute." *This exception has been added to insure that S. 1666 is not interpreted to override specific statutory exemptions.* [Emphasis added.]

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[21] The Chief Counsel of the Subcommittee, Mr. Fensterwald, also indicated that, in his view, the proposed exemption 3 referred to a "specific *statute*" (*id.* at 91; emphasis added).

In the 1965 Hearings before the same Senate Subcommittee, various media representatives, appearing in support of the FOI bill, pointed out that exemption 3 is "less susceptible to any general misinterpretation" than other exemptions "since the withholding is under specific statutes." Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, on S. 1160, *et al.*, 89th Cong., 1st Sess., p. 535 ("1965 Senate Hearings"). An identical statement appears in the 1965 Hearings before a Subcommittee of the House Committee on Government Operations, on H.R. 5012, *et al.* (Federal Public Records Law (Part 1)), 89th Cong., 1st Sess., p. 137.

During the 1965 Hearings before the Foreign Operations and Government Information Subcommittee of the House Government Operations Committee, Congressman Moss, the Chairman of the Subcommittee and a leading proponent of the FOI Act, stated that the FOI Act would provide for the availability of information "unless it is withheld * * * by some statutory authority given by the Congress." Hearings before a Subcommittee of the House Committee on Government Operations, on H.R. 5012, *et al.* (Federal Public Records Law (Part 1)), 89th Cong., 1st Sess. p. 14 ("1965 House Hearings"). He noted that nondisclosure would be permissible under the FOI Act for matters "covered by specific statute" and that there were "some 78 statutes which confer authority for withholding of information" (*id.* at 20, 53).[22]

Congress' intent to include within exemption 3 statutes which give government officials discretion to decide whether to disclose is further shown by con-

[22] Mr. Kass, Counsel for the Subcommittee, also pointed out (*id.* at 67):

"* * * it is not the intention of the bill as drafted and as introduced by the members of the committee and others to repeal any existing statute which authorizes the [Treasury] Department to withhold information such as income tax returns."

Mr. Smith, Acting General Counsel of the Treasury Department, concerned with the effect upon 18 U.S.C. 1905, noted that this intention appeared inconsistent with Section 2 of the bill before the Subcommittee, which provided that: "All laws or parts of laws inconsistent with the amendment made by the first section of this act [providing for disclosure of public records] are hereby repealed." 1965 House Hearings, pp. 67–68. Congressman Moss stated: "I think it is a very good point" (*id.* at 68). Section 2 was subsequently deleted from the bill reported out by the Subcommittee and was not enacted into law.

gressional recognition that the exemption covers a statute permitting the discretionary disclosure of census information. 13 U.S.C. 8 provides, with respect to information obtained in the census, that the Secretary of Commerce may "in his discretion" furnish "data for genealogical and other proper purposes," as well as transcripts or copies of tables and other census records, but that "[i]n no case shall information furnished * * * be used to the detriment of the persons to whom such information relates." During debates on the FOI bill in the House, Congressman Moss, in response to a question, agreed that exemption 3 covered information obtained by the Bureau of the Census. 112 Cong. Rec. 13646.

Instead of focusing upon the foregoing legislative history of exemption 3, the court of appeals gave primary consideration to a legislative comment about the FOI Act exemptions generally, which noted that the FOI Act sets up workable standards for withholding records in place of the general guidelines contained in Section 3 of the Administrative Procedure Act, the prior law (Pet. App. A, p. 9A). The legislative history of the specific exemption involved, however, must prevail over the history of the exemptions in general. Cf. *Environmental Protection Agency* v. *Mink, supra,* 410 U.S. at 81–82.

In any event there is no inconsistency between, on the one hand, Congress' purpose to replace the general standards of the old Administrative Procedure Act with specific exemptions and, on the other, Congress' manifest intention to preserve all existing nondisclosure statutes intact. While announcing a general

policy of disclosure, Congress also recognized the need for confidentiality in certain areas of government. The FOI Act therefore announces the rule that all "identifiable records" of government must be made public, unless covered by one of the Act's nine exemptions. 5 U.S.C. 552(a)(3) and (b).

Among the Act's specific exemptions is exemption 3, which preserves intact all pre-existing specific nondisclosure statutes. Each nondisclosure statute was enacted by Congress after balancing the need for public access to information against the need for confidentiality with respect to a particular agency. As we have seen, Congress struck the balance differently with respect to different agencies, forbidding any disclosure in some instances and authorizing nondisclosure in others.

In enacting the FOI Act, as a general disclosure statute, Congress deferred to the particularized judgments made with respect to individual agencies by earlier congressional action. Congress provided that disclosure must be made unless there is a specific Act of Congress authorizing nondisclosure. As we now show, Section 1104 is such an Act of Congress.

C. SECTION 1104 OF THE FEDERAL AVIATION ACT IS A STATUTE THAT "SPECIFICALLY EXEMPT[S]" FROM DISCLOSURE THE MATTERS IT COVERS

Section 1104 authorizes the Civil Aeronautics Board or the Federal Aviation Administrator to withhold from disclosure any information obtained by them under the Federal Aviation Act, when they conclude that disclosure would adversely affect the interests of

a person seeking confidential treatment "and is not required in the interest of the public." In this statute Congress has made the judgment that, in cases where the Board or the Administrator decides that the interests of persons seeking confidential treatment and the public interest require that information obtained by them not be made public, the material shall be kept confidential. Section 1104 "specifically exempt[s]" such material from disclosure within the meaning of exemption 3.

Although, as the court of appeals stated, Section 1104 is a congressional delegation of authority to the Board or Administrator to weigh the interest of the objecting party in confidentiality against the public interest in disclosure (Pet. App. A, p. 4A), that fact does not exclude it from the coverage of exemption 3. As we have seen, exemption 3 simply provides that, in order to be exempt under the FOI Act, documents must fall within an exemption of a specific nondisclosure statute; it requires neither that the withholding statute prohibit disclosure nor that it specify which documents are exempt.

Any doubt that Section 1104 is a specific nondisclosure statute preserved by Congress in exemption 3 is dispelled by the fact that Section 1104 was listed in an exhibit submitted during the Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on S. 921 (Freedom of Information and Secrecy in Government) conducted in 1958, 85th Cong., 2d Sess., as one of the "Statutory Provisions Restricting Disclosure of Gov-

ernment Information" (Section 1104 was then 49 U.S.C. 674) (pp. 985–987, 997).[23]

Moreover, during the 1965 House and Senate Hearings, the Civil Aeronautics Board stated its understanding that Section 1104 was encompassed by exemption 3, 1965 House Hearings, p. 237; 1965 Senate Hearings, p. 366. Nowhere in the legislative history is there any challenge to this interpretation.

In addition, a 1960 compilation of nondisclosure statutes, which was referred to in the 1965 House Hearings (p. 20), included a number of discretionary nondisclosure statutes similar to Section 1104. House Committee Print, Federal Statutes on the Availability of Information, 86th Cong., 2d Sess. Although Section 1104 is not specifically mentioned in the 1960 document, because, as its preface states "it does not purport to cover all of the Federal statutes," the 1960 compilation does list nondisclosure provisions which are similar to that section.

For example, the document lists 26 U.S.C. 6104(a)(1)(B), which states that the Secretary of the Treas-

[23] The 1958 Hearings dealt with S. 921, amending 5 U.S.C. 22, and S. 2148, which was one of the first bills to propose a FOI Act and which included the same exemption 3 language contained in the subsequent FOI bills.

The 1958 Hearings also demonstrate congressional awareness of the large number of nondisclosure statutes in existence. In those hearings, reference was made to "around 80 separate statutes providing for limiting information" and to "[t]he fact that Congress has enacted 80 specific statutes authorizing various agencies and departments of the executive branch of the Government to withhold information" (1958 Hearings, pp. 583, 584). The exhibit to the hearings listing the nondisclosure statutes shows that Section 1104 was understood to be one of the 80 "specific statutes" restricting disclosure of government records.

ury or his delegate, shall, upon request of a tax exempt organization, withhold from public inspection any information contained in its application and supporting documents "which he determines relates to any trade secret, patent, process, style of work, or apparatus, of the organization, if he determines that public disclosure of such information would adversely affect the organization." It also lists 15 U.S.C. 78x(b), which provides that any person filing any application, report or other document with the Securities and Exchange Commission may make written objection to the public disclosure of information contained in any such document and that the Commission, after a hearing, is to make the information public only if a disclosure "is in the public interest." [24]

[24] Professor Davis concludes that documents exempted from disclosure by statutes like 15 U.S.C. 78x constitute "matters that are specifically exempted from disclosure by statute" within the meaning of exemption 3. Davis, *Administrative Law Treatise*, § 3A.18 (1970 Supp.).

The court of appeals sought to distinguish Section 78x(b) on the ground that its application was limited by subsection (a) to "trade secrets or processes" (Pet. App. A, p. 8A). That phrase, however, appears only in subsection (a) and has no application to the nondisclosure provision contained in subsection (b). This has been the Securities and Exchange Commission's consistent administrative interpretation. The Securities and Exchange Commission so interpreted 15 U.S.C. 78(x) in 1939 in *American Sumatra Tobacco Corp.*, 7 S.E.C. 1033, affirmed, *American Sumatra Tobacco Corp.* v. *Securities and Exchange Commission*, 110 F. 2d 117 (C.A.D.C.). It recognized that while 15 U.S.C. 78(x)(a) established a "flat prohibition" on the disclosure of trade secrets and processes, 15 U.S.C. 78(x)(b) authorized the Commission to withhold other types of information, if its disclosure was not in the public interest. 7 S.E.C. at 1053. Compare this Court's observation in regarding 15 U.S.C. 79(V) which is substantially similar to 15 U.S.C. 78(X). This Section, it was

Congress intended, in enacting exemption 3, to preserve in tact all pre-existing nondisclosure statutes—including specifically Section 1104. To rule that Section 1104 was implicitly repealed by the FOI Act would thus defeat the congressional policy underlying exemption 3, as well as the policy of confidential treatment reflected in Section 1104 itself.

Moreover, such implied repeal of Section 1104 would severely undercut the Federal Aviation Administration's ability to properly fulfill its investigative duties. Section 1104 provides important assistance to the FAA in promoting aviation safety,[25] as demonstrated by the SWAP program involved in this case. That program is based upon the frank and full voluntary disclosure by an airline of all matters, including problems and defects, to the FAA's expert inspectors so as to prevent or correct unsafe conditions before an accident occurs.

If, however, those statements are to be made public, the airlines have indicated that their concern over the consequences of such disclosure will necessarily adversely affect their voluntary cooperation. Without that cooperation, the SWAP program will be seriously impaired.[26]

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stated, is "plainly intended to safeguard particular information" which, although required to be included in documents filed pursuant to the statute, nevertheless "may be regarded as a private or confidential character and as not directly concerning the public interest," *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U.S. 419, 438. See 17 C.F.R. 240.24b–2.

[25] The FAA has advised that since 1958, it has granted 75 requests for nondisclosure under Section 1104.

[26] The court of appeals in this case was of the view that one of the deficiencies of Section 1104 was that it does not provide

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
CARLA A. HILLS,
Assistant Attorney General.
ALLAN ABBOT TUTTLE,
Assistant to the Solicitor General.
LEONARD SCHAITMAN,
THOMAS G. WILSON,
Attorneys.

FEBRUARY 1975.

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for judicial review of a determination of nondisclosure. There is nothing in the language or legislative history of exemption 3, however, that suggests that the lack of judicial review of an administrative determination of confidentiality defeats the exemption of material that is "specifically exempted from disclosure by statute." In any event, an order of nondisclosure by the Administrator or the Civil Aeronautics Board is judicially reviewable under 49 U.S.C. 1486.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

ALEXANDER P. BUTTERFIELD, ADMINISTRATOR OF THE FEDERAL AVIATION ADMINISTRATION, ET AL
Petitioners

v.

REUBEN B. ROBERTSON, III AND JEROME B. SIMANDLE
Respondents

BRIEF AMICUS CURIAE OF MARY HELEN SEARS

EDWARD S. IRONS
1801 K Street, N.W.
Washington, D.C. 20006
Attorney for Mary Helen Sears

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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Respondents

BRIEF AMICUS CURIAE OF MARY HELEN SEARS

AUTHORITY TO FILE

This brief is filed pursuant to Rule 42(2) of this Court. The letters of consent from both parties have been lodged with the Clerk and are reproduced *infra*, p. 1a-2a.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1A-16A) is reported at 498 F.2d 1031. The order of the district court (Pet. App. C, pp. 19A-20A) is not reported.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitution, Article I, Sec. 8, Clauses 3 and 8 and Article VI, Clause 2.

The Freedom of Information Act, as amended, 5 U.S.C. 552(a)(3), (b)(3) and (c).

The Patent Code, Title 35 U.S.C. 102, 103, 122 and 282.

Section 1504 of the Federal Aviation Act of 1958, 49 U.S.C. 1504.

These provisions are reproduced *infra*, p. 3a.

INTEREST OF AMICUS

Amicus curiae is the petitioner in No. 74-584, a presently pending petition for writ of certiorari involving a question identical to the question 1 before the Court. *Amicus* will accordingly be directly affected by the result of the case and hence wishes to be heard on points that the parties are not expected to brief.

In particular, the parties to this case No. 74-450 will not brief at least the following aspects of the identical question:

(a) whether the 5 U.S.C. 552(b)(3) provision for nondisclosure by the government of "matters specifically exempted from disclosure by statute", interpretation of which is the focus of the common question presented by the two petitions, is to be read in context with the intent and purpose of each individual statute of the "100", more or less, contended by the government to thus "specifically" exempt, rather than as a categorical generalization promulgated in furtherance of fostering overall governmental secrecy.

The specific statute involved, § 1104 of the Federal Aviation Act, does not afford a sufficient scope of constitutional, historical, legislative or precedent background on which to brief or argue even a sampling of the many individual federal policies which demonstrate the incorrectness of the government's broad scope argument in this case.

(b) important patent policy issues of fundamental constitutional importance subsumed in the identical question presented as it arises in No. 74-584, but which will not be briefed in this case because it involves only federal aviation law and policies.

SUMMARY OF ARGUMENT

1. Congress, in adopting the Freedom of Information Act, was faced with a large number of widely differing, preexisting statutes pertaining to the disclosure of information by the various administrative agencies. The Congress solved this problem in the FOI Act, by providing (i) in 5 U.S.C. 552(b), a series of nine guidelines which carefully define limits for the exercise of administrative discretion to withhold information, whether pursuant to statute or otherwise, and (ii) in specific exemption 3 of § 552(b) that only those statutes by which Congress itself had "specifically exempted" material would afford a *per se* statutory basis for withholding records otherwise subject to the disclosure provisions of § 552(a)(3). Had the Congress proceeded otherwise to qualify under exemption 3 all preexisting statutes which permit nondisclosure of requested records, the FOI Act would have been devitalized *ab initio.*

2. The basic differences in the language, purpose and legislative history of the several statutes contended by the government to fall within exemption 3 underlines the wisdom of the Congressional approach. The limited record before this Court in this case, based solely on § 1104 of the FAA Act, precludes a reasoned analysis of all such statutes and requires a strict construction of exemption 3.

3. The fundamental differences between the language and purpose of § 1104 of the FAA Act specifically at issue in this case and of § 122 of the Patent Code at

issue in No. 74-584 strongly emphasize the infeasibility of a blanket ruling qualifying all so-called "discretionary" statutes under exemption 3. These differences demonstrate that such a ruling would, in the case of § 122, raise new issues of constitutional dimension.

ARGUMENT

1. In No. 74-450, the government seeks a decision of this Court which "will largely resolve the issue of [exemption 3's] application to nearly 100 statutes . . ."[1] which admittedly "differ widely" (P. Br. 12).

The Court is ill-equipped, in the narrow compass of this case, to issue any such pervasive ruling. The "question presented" is far broader than the *single* issue decided below—*i.e.*, the question of whether § 1104 of the FAA Act qualifies under exemption 3 insofar as the SWAP reports are concerned.

Although a plurality of other appellate decisions involving the application of exemption 3 to other statutes and other records were substantially concurrently rendered, for various reasons—virtually in their entirety attributable to the government's acts—*none* of these decisions are before this Court for review.[2] Only this case—

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[1] Reply Memorandum for Petitioners, p. 3.

A similar gambit is attempted in No. 74-489, cert. granted February 18, 1975, in which the first "Question Presented" invites a broad ruling that exemption 6 "covers *all* personnel files" rather than, as the exemption itself states, only those "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy".

[2] The applicability of exemption 3 to 42 U.S.C. § 1306(a) is the subject of at least *four* cases: *Stretch* v. *Weinberger*, 495 F.2d 609 (3 Cir. 1974); *Serchuk* v. *Weinberger*, 493 F.2d 693 (5 Cir. 1974); *Schechter* v. *Weinberger*, 506 F.2d 1275 (D.C. Cir. 1974); *People of California* v. *Weinberger*, 9 Cir., No. 73-1494 (1974).

[Footnote continued on page 5]

preselected by the government as most likely to result in the decision it seeks—is to be considered on its merits.

Because the many so-called "discretionary" statutes having different language, purposes and legislative histories, admittedly "differ widely" a blanket ruling *qualifying* all such legislation under exemption 3 is inappropriate.[3] No such blanket ruling cannot soundly be rendered on the basis of the limited record in No. 74-450 which involves only § 1104 of the FAA Act.

Congress was careful to avoid the hazards of such an ill-considered approach. Recognizing that the many "discretionary" statutes involved indeed "differ widely" and that specific legislative reconsideration and modification of each was impractical, Congress invoked the reasonable alternative of (i) providing in exemption 3, that agency withholding of records on *statutory* grounds is permitted only where, as a result of Congress' own acts, the requested material is "specifically" exempted by the statute itself, and (ii) requiring that administrative discretion, where countenanced by other statutes, be exercised strictly within the limits defined by the remaining exemptions.

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[2] [Continued]

"The government does not intend to petition for a writ of certiorari in Serchuk or Schechter. . .". Reply memo in Support of Pet. for Cert. in No. 74-450, P. 2, n. 1.

The applicability of exemption 3 to 35 U.S.C. § 122 is the subject of case No. 74-584.

The application of exemption 3 to § 613(c) of the Internal Revenue Code is the subject of the decision *Tax Analysts and Advocates* v. *Internal Revenue Service*, 505 F.2d 350 (D.C. Cir. 1974)—which conflicts with the Fourth Circuit's decision in Sears, *supra*. See the Petition in No. 74-584 at pp. 20-21.

No petition for writ of certiorari has been filed by the government in *Tax Analysts*.

[3] See the Petition in No. 74-584 at pp. 18-20 and the "Petitioner's Emergency Motion for Immediate Disposition of Pending Petition for Writ of Certiorari" in No. 74-584 at pp. 2-3.

Consonant with this approach, Congress also enacted § 552(c) to make it clear that agency withholding of records is *not* authorized *"except as specifically stated"* in the FOI Act.

2. It is common knowledge that "Not one executive branch agency, not one government official testified in favor of the [FOI] bill during the Subcommittee's hearings prior to its passage in 1966".[4] Post-enactment, agency resolve to defeat the Congressional purpose was furthered by the Attorney General's 1967 memorandum—in fact a partisan brief—which "is not the law . . . it reflects the point of view of the agencies, all of whom opposed enactment".[5] Not surprisingly, under the aegis of the Department of Justice, "The efficient application of the Freedom of Information Act has been hindered by 5 years of foot-dragging by the Federal Bureaucracy", and "The nine exemptions in the Act which permit withholding of information have been misused by the Federal agencies."[6]

3. Contrary to the letter and purpose of the FOI Act, the Attorney General's memorandum states that the reference to "nearly 100 statutes" which appears in the

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[4] "The Freedom of Information Act", Hearings Before Subcommittee of Committee on Government Operations, H. R. 93d Cong., 1st Sess., on H.R. 5425 and 4960, May 2, 7, 8, 10 and 16, 1973 (p. 2).

[5] Davis, "The Information Act: A Preliminary Analysis," 34 U. Chic. L.R. 761 (1967).

[6] Administration of the Freedom of Information Act, H.R. 92-1419, 92d Cong., 2d Sess., Sept. 20, 1972 (pp. 8; 11).

Congress has recently enacted P.L. 93-502 over the President's veto to limit exemptions 1 and 7 with a stated "intent to override" this Court's unduly broad interpretation of exemption 1 in *Environmental Protection Agency* v. *Mink*, 410 U.S. 73 (1973). Freedom of Information Act Amendments, S. R. 93-1200, 93d Cong., 2d Sess. (p. 12).

non-authoritative House Report[7] "apparently was inserted . . . in reliance upon a survey [not otherwise identified] conducted by the Administrative Conference of the United States in 1962" and on that basis speculates that the intention of Congress was "to preserve whatever protection is afforded under other [than the FOIA] statutes whatever their terms" (pp. 31-32).

In the present case, the government, in urging an affirmative answer to the "Question Presented", similarly contends that exemption 3 covers "*all* material with respect to which Congress by statute has provided for nondisclosure upon various terms, including statutes that give government officials discretion to decide whether to disclose" (P. Br. 2). Its brief adverts repeatedly to the aforesaid "100 statutes" and insists that exemption 3 extends to *all* statutes which "specifically require *or* permit nondisclosure of government information, without regard to the circumstances" and "whether or not they specify the particular documents to be kept confidential" (P. Br. 10)[8] and that "under exemption 3 the only function of a reviewing court is to determine whether there is a specific statute requiring or authorizing the confidentiality of the material involved" (P. Br. 15). These contentions totally conflict with Congress' own 1974 restatement of its intent in adopting the FOI Act.

In 1974, the Congress published the "Freedom of Information Act Source Book" "designed to provide the public with the arsenal necessary to obtain maximum disclosure from the departments and agencies of the government" (p. 3). Included in this "arsenal" is a "Discussion" and "Summary" of the legislative history, as well as 113 pages of "Legislative Materials: Senate and House Re-

[7] It is settled that the Senate report (S. Rep. 813, 89th Cong., 1st Sess. (1966) is the more reliable. See *Stokes* v. *Brennan*, 467 F.2d 699, 794 (5 Cir. 1973) and cases cited.

[8] See also P. Br. 11, 12, 13 and 14.

ports and Debates". It is careful to point out that the Attorney General's memorandum "should properly be considered *not* part of the legislative history" (p. 9, emphasis in original).[9] It emphasizes that:

> "The first Congressional attempt to formulate a general statutory plan to aid in free access occurred in 1946. . . .
>
> * * * *
>
> "Soon after the 1946 enactment, it became apparent that, in spite of the clear intent of Congress to promote disclosure, some of its provisions were vague and that it contained disabling loopholes which made the statute, in effect, a basis for withholding information." (p. 3)

and that

> "To remedy the weakness of existing law, the Senate Report [S. Rep. 1219, 88th Cong., 2d Sess. (1964)] stated the purpose of S. 1666 as: '. . . to eliminate such phrases [giving administrators discretion to decide whether to disclose] to establish a general philosophy of full agency disclosure *unless information is exempted under clearly delineated statutory language*. . . .'" (p. 4)[10]

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[9] Freedom of Information Act Source Book: Legislative Materials, Cases, Articles, Sen. Doc. 93-82, 93d Cong., 2d Sess. (1974), p. 8 (footnote omitted)—hereinafter referred to as "Source Book".

[10] The pertinent portion of S. 1666, Sec. 3(c)(i), like exemption 3, specified that "(c) Each agency shall . . . make its records promptly available except those which are (i) specifically exempt from disclosure by statute".

Senator Long's *pertinent* comments as to Sec. 3(c) state:

> "Section 3(c) contains the portion of the bill which has been most extensively revised. It requires that all agencies' records be made promptly available except in those cases where such records are: (1) *specifically covered by a statutory exemption*, as in the case of individual income tax returns" [see 26 U.S.C. § 6103]. See *infra*, p. 6a-7a.

Senator Long's comments quoted out of context at P.Br. 18 addressed a different Sec. 3(c) of S. 1666 are inapposite.

The government itself states "That legislative history of the specific exemption involved, however, must prevail . . ." (P.Br. 21).

The very reference in the early legislative history to "nearly 100 statutes" indicates strongly that the Congress had no intention to continue the unbridled discretion which these statutes, in common with the predecessor information statute, vest in the administrative agencies. Congress certainly recognized that to do so would defeat *ab initio* the very purpose of the new Act.

Having no practical way to consider separately each of the "nearly 100 statutes", the Congress was careful to make it clear:

(a) by § 552(c), that the Act "does not authorize the withholding of information or limit the availability of records to the public, except as *specifically* stated. . . ." [11]

(b) by exemption 3, that *the only* statutes which authorize withholding are those in which Congress *itself*, as distinguished from an administrator, "specifically"

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[11] "The purpose of this subsection [552(c)] was to make it clear beyond doubt that all materials of the Government are to be available to the public *unless specifically* allowed to be kept secret by the exemptions." S. Rep. 813, 89th Cong., 1st Sess. (1966). The corresponding House Report 1497 is in full accord. It states that "The purpose of this subsection [552(c)] is to make it clear beyond doubt that all materials are to be made available to the public unless specifically exempt from disclosure by the provisions of [the exemptions] or limitations spelled out in earlier sections".

As the Fourth Circuit noted in *Wellford* v. *Hardin*, 444 F.2d 21, 24-25:

> "A broad construction of the exemptions would be contrary to the express language of the Act . . . Speaking of this provision [§ 552(c)], one commentator has said:
>
> > 'The pull of the word 'specifically' is toward emphasis on statutory language and away from all else—away from implied meanings, away from reliance on legislative history, away from needed judicial legislation'.
>
> K. Davis, The Information Act: A Preliminary Analysis, 34 U. Chic. L. Rev. 761, 783 (1967)."

"exempted . . . [the requested material] under clearly delineated statutory language",[12] and

(c) that the exercise of administrative discretion under all other relevant statutes must be limited by and find sanction in one or more of the other exemptions.[13]

4. Congress has uniquely at pains to make its intentions quite clear that the paramount disclosure objective of the FOI Act is not to be subsumed by an overbroad interpretation of the nine exemptions.

In 1973, after this Court's generous interpretation, in *Environmental Protection Agency* v. *Mink*, 410 U.S. 73,

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[12] This is the view of at least the Third, Fifth and District of Columbia Circuits. See *Stretch* v. *Weinberger*, 497 F.2d 639, (3 Cir. 1974):

> ". . . We agree, as did the district court, that the *exempting statute must prescribe* some basis upon which the Secretary is to decide. Otherwise, there would be no escape from the unacceptable conclusion that the word 'specifically', as used in section 552(b)(3), is surplusage."

Serchuk v. *Weinberger*, 493 F.2d 663 (5 Cir. 1974); *Tax Analysts and Advocates* v. *Internal Revenue Service*, 505 F.2d 350 (D.C. Cir. 1974).

Petitioner's brief *incorrectly* states that the Fourth Circuit, in No. 74-584 "agreed with the interpretation of exemption 3 in Stretch" (p. 17, n. 16). In truth, the conflict in the decisions of the Third and Fourth Circuits "is direct and obvious". See the Petition in No. 74-584, p. 21. The Fourth Circuit's pretended "agreement" with the ruling in *Stretch* is sheer sophistry.

[13] It is facially apparent that § 1104 does *not* "specifically exempt" the SWAP reports—and hence that exemption 3 is not applicable. Thus, the "SWAP" reports, *if* they are to be suppressed, must be shown to qualify under an exemption other than 3, *e.g.*, under exemption 4's reference to "commercial . . . information obtained from a person and . . . confidential".

Based on the existing record, it appears that the realistic approach in this case—*if* identifying information such as the names of the involved airlines should be considered legitimately subject to withholding—would be to delete only that information before releasing the balance of the reports to the public. See n. 19, *infra*, p. 14.

of exemption 1, Congress took immediate remedial steps.[14] Included was the 1974 publication of the "Source Book", which in its "Introduction" states:

> "Most significantly, the courts appear to adopt and reinforce at each opportunity the congressional intent underlying passage of the Freedom of Information Act. For example, one Court of Appeals, after ordering disclosure of documents requested by the plaintiff but withheld by the government in a recent case, observed:
>
> > '. . . '. . . The touchstone of any proceedings under the Act must be the clear legislative intent to assure public access to all governmental records whose disclosure would not significantly harm specific governmental interests. The policy of the Act requires that the disclosure requirement be construed broadly, *the exemptions narrowly*'.[8]

"[8] Soucie v. David, 448 F.2d 1067, 1080 (D.C. Cir. 1971)"

Consonant with its "clear legislative intent" that the "exemptions" are to be "construed . . . narrowly", the Congress, over the President's veto, enacted P.L. 93-502 with the clear "intent to override the Supreme Court's holding in the case of EPA v. Mink."[15] and to clarify and restrict the scope of exemptions 1 and 7 where abuse consequent from overboard construction contrary to the policy of the Act was already manifest.

Unabashed, the government again appears before this Court urging a broad construction of exemption 3 in

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[14] The government emphasizes Mr. Justice Stewart's observations in *Mink*, 410 U.S. at 95, note, that exemption 3 is structured similarly to exemption 1. See P. Br. 10, 15.

[15] "Freedom of Information Act Amendments" S. Rep. 93-1200 93d Cong. 2d Sess.

clear derogation of the intent of Congress emphatically reiterated less than one year ago.[16]

5. The circumstance that "the discretionary statutes differ widely", emphasized at P.Br. 12, *et seq.*, argues strongly against the government's position that "By exemption 3, Congress intended to continue the effectiveness of all existing nondisclosure provisions" (P.Br. 13).

Per contra, Congress was careful to avoid a stillborn delivery of the FOI Act by expressly limiting exemption 3 to only that material which Congress *itself* "specifically exempted from disclosure by statute" and by defining in the remaining exemptions the outer limits for the exercise of administrative discretion to suppress information from the public.

> "It should be emphasized that the exemptions to the FOIA were not intended by Congress to be used either to prohibit disclosure of information or to justify automatic withholding of information. Rather, they merely mark the outer limits of information that may be withheld where the agency makes any affirmative determination that the public interest and the specific circumstances presented dictate that the information *should* be withheld. Agencies have been slow to adopt this attitude, but enlightened judicial decisions reflect this approach to interpreting the force of the FOIA exemptions." (Emphasis in original; "Source Book", p. 2)

6. Such an approach is essential to informed enforcement of the FOI Act—a circumstance sharply underlined by the conflicting considerations which are applicable to (1) § 1104 of the Federal Aviation Act specifically at

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[16] Similar government attempts to subvert the FOI Act's broad disclosure provisions by an overindulgent "interpretation" of its narrow exemptions are found in No. 73-1233, *National Labor Relations Board* v. *Sears, Roebuck & Co.* and No. 74-489, *Department of the Air Force* v. *Rose*, cert. granted February 18, 1975.

issue in No. 74-450 and (2) to § 122 of the Patent Code which is specifically at issue in No. 74-584.

According to the government, the public interest will be compromised if § 1104 **does not** qualify under exemption 3 because public disclosure of the "SWAP" reports "will necessarily adversely affect [the airlines'] voluntary cooperation" with the FAA and "the SWAP program will be seriously impaired" (P.Br. 26).[17]

In contrast, the public interest in the issuance of only valid patent monopolies and the "strong federal policy favoring full and free use of ideas in the public domain", *Lear* v. *Adkins*, 395 U.S. 653, 674 (1969), *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. ——; 94 S. Ct. 1879; 40 L. Ed.2d 315, 325 (1974), will continue to be seriously prejudiced *if* § 122 **does** qualify under exemption 3. Indeed, in such a case, a serious question of the constitutionality of both exemption 3 and § 122 is raised.

Similar dichotomy unquestionably exists as to the whole spectrum of "widely" different discretionary statutes. This circumstance, without more, precludes a blanket ruling on any informed basis as to the scope of exemption 3. Indeed, there is no record before this Court upon which such a blanket ruling could properly be posited, and in the absence of review of at least the other current cases involving the application of exemption 3 to various of these widely different statutes, no basis on which such a record could be presented. See n.2, *supra*, p. 4.[18]

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[17] These arguments represent mere self-serving conclusions of the FAA itself, and of the Air Transport Association, *unsupported* by specific factual evidence. As such, they should be disregarded, for failure to discharge the burden of proof imposed on the agency by § 552(a)(3).

[18] In these circumstances, a blanket ruling as to exemption 3 would be subject to the same criticism as that recently leveled against the decision in *Kewanee, supra,—i.e.*, that it "ignored many of the critical issues, dealt with others by making factual assumptions con-

(a) The petition states that the respondents in No. 74-450 seek "reports prepared by the . . . (FAA)" in connection with the SWAP program "which supplements the FAA's ordinary surveillance of airlines . . . and is intended to prevent unsafe conditions from arising . . ." and that "'[t]he system depends upon the frank and full disclosure of the airline" (Pet. 4-5). On this basis, it is urged that any construction of exemption 3 which would make the SWAP reports public "would severely undercut the Federal Aviation Administration's ability to properly fulfill its investigative duties" and that "If . . . those [SWAP] statements are to be made public, the airlines have indicated that their concern over the consequences of such disclosure will necessarily adversely affect their voluntary cooperation. Without that cooperation, the SWAP program will be seriously impaired" (P.Br. 26).[19]

These considerations have no relevance whatever to the issues arising in Case No. 74-584 under § 122 of the Patent Code.

(b) In No. 74-584, petitioner seeks access to so-called "abandoned" patent applications, *i.e.*, applications filed in the United States Patent Office on which patent protection has been refused or forfeited. The Fourth Circuit

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trary to experience and the record before it. . .". *Stern*, "A Reexamination of Preemption of Trade Secret Law After Kewanee," 42 Geo. W.L.R. 927, 930 (1975).

[19] These arguments should be presented, if at all, as reasons for deletion of material shown to be sensitive, *e.g.*, the identity of the airline involved, from the reports prior to production. They afford no justification cognizable under the FOI Act for suppression of an entire document. See § 2(c) of P.L. 93-502 requiring production of "reasonably segregable" portions of records.

Clearly, these factually unsupported arguments do not justify overturning the frequently reiterated intention of Congress that the exemptions are to be construed "narrowly", by a blanket ruling qualifying under exemption 3 all of the many statutes "which permit nondisclosure . . . without regard to the circumstances" (P.Br. 10).

Court of Appeals adopted a prohibited broad construction of exemption 3 to hold that, although the statute does *not* in terms, *i.e.*, "specifically", refer to them, these abandoned files are nevertheless "specifically exempted" by § 122 which provides:

> "Applications for patents shall be kept in confidence by the Patent Office and no information concerning the same given without authority of the applicant or owner *unless necessary to carry out the provisions of any Act of Congress* or in such special circumstances as may be determined by the Commissioner".

In contrast to the FAA's necessary reliance upon "frank and full disclosure by an airline of all matters, including problems and defects", the inducement to file patent applications is the hope of acquiring a valuable asset—the private monopoly afforded by the patent laws.[20]

The success of the patent system does not depend upon the suppression of the unpatentable ideas contained in the abandoned applications of unsuccesful applicants. The Patent Office "admits that the substance of some abandoned applications has become public knowledge".[21] The agency has stipulated that "The Patent Office routinely

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[20] The Congress itself, in considering exemption 4, has recognized that:

> "A general principle should be considered, providing that the exemption shall not apply to information furnished by any person where the purpose of providing information is to secure a special financial benefit or privilege [e.g., a patent] from the federal government." op. cit. *supra*, n. 6, n. 6.

" 'The patent is a privilege . . . conditioned by a public purpose.' " *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 314 (1972).

[21] Par. 25 of Answer to Complaint in No. 74-584 (App. I, pp. 13-20).

maintains in secret abandoned applications, the precise text of which has been laid open to public inspection" and that the Patent Office makes no "effort to ascertain whether or to what extent the subject matter of each abandoned patent application has been made publicly available".[22] Clearly, no Congressional purpose is served by the total agency suppression of these abandoned files under color of § 122.

A determination of whether § 122 is a statute which "specifically exempts" under exemption 3 requires a careful analysis of the evidentiary requisites of at least 35 U.S.C. §§ 102, 103 and 282 in light of the constitutional patentability standards. Such an analysis compels the conclusion that public access to abandoned patent applications is "necessary to carry out the provisions" of at least these "Acts of Congress". Hence, such applications

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[22] Stip. Pars. 26 to 29 (App. I, 42-53) in No. 74-584.

The practical experience in the United States and foreign countries contradicts the government's argument, advanced without record support below that publication of abandoned applications may conflict with the policy of the patent clause by discouraging inventors from applying for patents. For the first three-quarters of the century of the operation of the patent system, abandoned applications were published and were used as prior art against pending cases. As noted *supra*, the content of many abandoned patent applications *is* now published—without adverse effect on the patent system. Pending legislation to revise the United States patent laws would require the publication of virtually all patent applications, pending and abandoned. See, *e.g.*, S. 473, 94th Cong. 1st Sess., §§ 122; 135. Such revision accords with the long standing practice in most foreign countries to publish applications with leave to any member of the public to oppose the patent grant. See, *e.g.*, *McKie*, "Proposals For an American Patent Opposition System in Light of the History of Foreign Systems" 56 J.P.O.S. 94 (1974). The result in such countries has not been a decrease in the number of applications filed, but an *increase* in the quality of issued patents. See the Petition in No. 74-584, p. 28, n. 40 and associated text.

are excluded from § 122's confidence provisions by that section's *own* words of exemption.[23]

In sharp contrast to the alleged adverse consequences of publication of the SWAP reports on the administration of the FAA Act, the administration of the patent laws is severely prejudiced by agency *suppression of the evidence germane to patentability* which the abandoned application files admittedly contain.

Thus, it is stipulated that "At least some abandoned . . . applications are evidence of the level of skill in the art . . . as of their filing date",[24] *i.e.*, the very yardstick which this Court has twice stated is to be used in applying the "obviousness" standard of § 103 of the Patent Act to the "differences" betwen the "prior art" and the patent claims to gauge the presence of constitutionally patentable invention. *Graham* v. *John Deere Co.*, 383 U.S. 1 (1966). *Anderson's Black Rock* v. *Pavement Salvage Co.*, 396 U.S. 57 (1969). Moreover, under the presumed authority of § 122, the Commissioner not only suppresses the "skill in the art" evidence (which need not be public)[25] that is present in the abandoned files—

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[23] In fact, public access to abandoned application is "necessary to carry out the provisions of § 553(a)(3) itself, which was enacted in 1967, some 15 years after the 1952 Patent law revision. "The broad language of the FOIA, with its obvious emphasis on disclosure and with its exemptions carefully delineated as exemptions", *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1 (1974), makes it clear that "*disclosure*" is indeed essential to "carry out" *its* provisions, absent clear, express and specific statutory authorization for agency suppression. Rather than authorizing such suppression, § 122 itself deprives the Patent Commissioner of discretion and so mandates publication of all material requisite to satisfy the disclosure objective of the FOI Act.

[24] Stip. Par. 12, App. I, 35 in No. 74-584.

[25] *International Glass Co.* v. *United States*, 408 F.2d 395, 404 (Ct. Cl. 1969); *Servo Corp. of America* v. *General Electric Co.*, 337 F.2d 716 (4 Cir. 1964), cert. den. 383 U.S. 934; *Felburn* v. *New York Central Railroad*, 350 F.2d 416 (6 Cir. 1965); *United States Pipe & Foundry Co.* v. *Woodward Iron Co.*, 327 F.2d 442 (4 Cir.

but with premeditation also imposes "secrecy" to *disqualify* unpublished abandoned patent applications as statutory "prior art" under § 102(a) and (b) on the sole ground that *because* of the *agency's* secrecy rule, the suppressed applications are not "public" within the meaning of these statutes. As the agency put it below ". . . nonreliance by the Patent Office upon abandoned applications and preserving them in secrecy are opposite sides of the same coin".[26]

The net result of this—and other Patent Office rules of expediency which compromise the meaningful examination of patent applications—is the "notorious difference

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1964); *Package Devices, Inc.* v. *Sun Ray Drug Co.*, 301 F.Supp. 768 (E.D.Pa. 1969), aff'd 432 F.2d 272 (3 Cir. 1970).

The *un*published activities of a plurality of individuals resulting in substantially the same solution to substantially the same problem at substantially the same time has long been recognized as cogent evidence that the "level of skill" in the pertinent art was such as to preclude patentability. See *Concrete Appliances Co.* v. *Gomery*, 269 U.S. 177 (1925); *Kay Products Corp.* v. *Martin Supply Co.*, 202 F.2d 47 (4 Cir. 1953). In *Dow Chemical Co.* v. *Halliburton Oil Well Cementing Co.*, 324 U.S. 320, 326 (1945), this Court, invalidating the patent in suit, found that a private unpublished report emanating from the Gypsy Oil Company was qualified as evidence of the level of skill even if an "abandoned experiement not amounting to anticipation."

[26] The Patent Office has stipulated that:

> "18. Abandoned U.S. patent applications which are referred to in issued patents [and hence publicly available] are relevant when utilized by the Patent Office in examining patent applications for compliance with 35 U.S.C. 102 and 103 pursuant to 35 U.S.C. 131, 132 and 134, by the courts pursuant to 35 U.S.C. 141 to 146 inclusive in reviewing Patent Office decisions and by the courts under 35 U.S.C. 281 and 282 in adjudicating the validity of issued patents." (App. I, 39 in No. 74-584).

—and indeed that:

> "25. Under present practice of the Patent Office any document which can be proved to be publicly available anywhere in the world may be used as a reference against a pending patent application. . . ." (App. I, 42 in No. 74-584).

between the standards applied by the Patent Office and the courts", *Graham, supra,* 383 U.S. at 18; see *Kewanee Oil Co.* v. *Bicron Corp.*, 412 U.S. 546, 5— (1974)[27] the consequent grant of "A significant number of patents . . . for trivial inventions" and "the sagging reputation of the patent system".[28]

7. Against this background, the fundamentally different language and purpose of § 122 of the Patent Act and § 1104 of the FAA Act are of controlling significance. In § 122, Congress has expressly provided that the statute's discretionary "confidence" provisions shall *not* apply to any material

> ". . . necessary to carry out the provisions of any Act of Congress. . .".[29]

Under *this* provision—which has no counterpart in § 1104—the Commisioner has **no** discretion to withhold **any** such "necessary" material from the public or by the im-

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[27] In contrast to the Patent Office suppression thereof, the Federal Courts routinely consider abandoned patent applications as evidence germane to patentability (validity of issued patents) whenever it is available. See *Smith* v. *Hall*, 301 U.S. 216 (1937) and *Package Devices, Inc., supra.*

Consonantly the *courts* routinely act to compel production for use in patent litigation of both pending and abandoned patent applications notwithstanding § 122 and such rules as 37 C.F.R. 1.108 and 1.14. *See, e.g., James B. Clow & Sons, Inc.* v. *United States Pipe & Foundry Co.*, 313 F.2d 46 (5 Cir. 1963); *Carrier Mfg. Co.* v. *Rex. Chainbelt, Inc.*, 281 F.Supp. 717 (E.D. Wis. 1968).

The dichotomy between the Patent Office and the courts as to the evidentiary effect of abandoned patent applications in the adjudication of patentability and patent validity questions is discussed at p. 22, *et seq.* of the Petition in No. 74-584.

[28] Marquis, "Improving the Quality Control of Patents", 59 Minn. L.R. 67, 79 (1974).

[29] The Fourth Circuit—unable to harmonize its holding that § 122 vests discretion in the Commissioner to suppress the very material which this clear provision specifically excludes from any "confidence"—simply ignored it. See Pet. in No. 74-584, p. 14, *et seq.*

position of "secrecy", to disqualify it as prior art cognizable under the patent laws.[30]

This provision places § 122 in an entirely separate category from statutes like § 1104 which contain no parallel words. This fundamental difference in the wording and purpose of the involved statutes seriously challenges the propriety of a blanket ruling construing exemption 3 broadly to include both § 1104 and § 122 as the government urges.

Faced with problems of this type, Congress made no effort to consider each of the "nearly 100 statutes" but instead provided in exemption 3 that *only* where the *statutes themselves* "specifically exempt" is agency suppression of any material on *statutory* grounds alone to be permitted. To the extent that any of the "nearly 100 statutes" give government officials discretion to decide whether to disclose", that discretion is to be exercised strictly within the limits defined by the other exemptions which must be narrowly construed to insure that the objectives of the FOI Act are realized. This Congressional approach is reasonable and should be adopted by this Court.[31]

8. Serious doubt as to the constitutionality both of exemption 3 and § 122 arises under the Patent Clause of

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[30] As is apparent from the final, and alternative, *discretionary* provision "*or* in such special circumstances *as may be determined* by the Commissioner" to warrant disclosure.

[31] The government states that "one strong indication that § 1104 was among the nondisclosure statutes Congress intended to preserve in enacting exemption 3 is the fact that it was specifically mentioned in a list of nondisclosure statutes submitted to Congress during the *1958* hearings . . . " (P.Br. in 74-450, p. 11, 23-24).

It is much more reasonable to conclude that Congress, almost ten years later in 1967, did not wish to reexamine all of these statutes and prescribe new guidelines for each—and hence left intact only those statutes in which Congress *itself* had already "specifically exempted" identified material from disclosure. The 1974 "Source Book" strongly supports this conclusion.

the Constitution as these statutes are applied to permit the continued suppression by the Patent Commissioner of evidence—admittedly contained in the abandoned files—requisite to the discharge of his duty to grant private monopolies for *only* those "inventions" which satisfy the constitutional patentability standard.[32]

Nor can their application of exemption 3 and § 122 be legitimatized on the pretext of justifying "assurances" by the Commissioner to unsuccessful applicants that the unpatentable ideas, *whether or not secret*, which are con-

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[32] As held in *Graham, supra*, and restated in substance in *Anderson's Black Rock, supra*, the patentability "standard expressed in the Constitution . . . may not be ignored. And it is in this light that patent validity 'requires reference to a standard written into the Constitution'. A&P Tea Co. v. Supermarket Corp., supra, 340 U.S. at 154. . . ." The constitutional patent clause "is both a grant of power and a limitation", a qualified authority . . . limited to the promotion of advances in the 'useful arts' "; the "Congress in the exercise of the patent power may *not* overreach the restraints imposed by the stated constitutional purpose". *Only* "[w]ithin the scope established by the Constitution, Congress may set out conditions and tests for patentability" 383 U.S. at 5, 6, 35 U.S.C. § 103 "comports with the constitutional strictures", 383 U.S. at 17, *only* if construed and applied in a manner to implement and not to denigrate the constitutional patentability standard. It is stipulated that "the constitutional standard for patentable invention . . . [is] now codified in 35 U.S.C. 103" (Stip. Par. 23, App. 42).

In 1969, the Court in *Lear* v. *Adkins*, 395 U.S. 653, adverted to the "demanding standard of invention explicated in our decision in Graham v. John Deere Co.", 395 U.S. at 676, and to "the important public interest in permitting full and free competition in the use of ideas which are in reality a part of the public domain", 395 U.S. at 670. In 1971, in *Blonder-Tongue, supra*, the Court said:

> ". . . A patent yielding returns for a device that fails to meet the congressionally imposed *criteria of patentability* is anomalous. . . .". 402 U.S. at 343.

tained in abandoned patent applications will be suppressed from the public.[33]

Contrary to this approach, it is "the duty" of this Court and of the Patent Office "to avoid a construction that would suppress otherwise competent evidence unless the statute, strictly construed, requires such a result". An "assurance" even by the President that "gives the statute" a meaning which it does not require is totally inoperative. See *St. Regis Paper Co.* v. *United States*, 368 U.S. 208, 219 (1961).

Nor can agency imposition of secrecy somehow be justified on the speculative pretext of the protecting unidentified trade secrets in those *few* abandoned applications which may disclose them.[34] The agency attempt to

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[33] The final agency denial of the *Sears* request for abandoned patent applications states that "in reliance on [§ 122] inventors make full disclosure of their inventions in patent applications with the assurance that the valuable trade secrets therein will be disclosed to the public only at the inventor's option. . . ." (Pet. in No. 74-584, p. 5, n. 4).

Contrary to this representation, Congress *requires* "full disclosure" of inventions in patent applications in 35 U.S.C. § 112 which provides that "the specification shall contain a written description of the invention and of the manner of making and using it in such full . . . terms as to enable any person skilled in the art . . . to make and use the same. . . ."

Agency application of § 122 to suppress *non*secret ideas clashes head-on with the "strong federal policy favoring full and free use of ideas in the public domain", *Lear* v. *Adkins*, 395 U.S. at 674.

The agency nondisclosure "assurance" under color of § 122 clearly extends to *nonsecret* ideas. See the discussion *supra*, p. 15-16.

[34] The Patent Office has stipulated:

"Applicants do not record in writing or otherwise any identification of any alleged trade secrets in the patent applications they cause to be filed." (Stip. Par. 26, C. A. App. I, 19).

[Footnote continued on page 23]

justify its unauthorized "assurance" on a "trade secret" pretext is particularly anomalous since "The U.S. Patent Office has no right under any statutory or constitutional provision or on any other basis to recognize any sort of proprietary right in subject matter it has adjudged unpatentable" (Stip. Par. 51, App. I, 48 in No. 74-584).

§ 122 and exemption 3 are invalid as applied in this manner to hobble the Patent Office in the discharge of its sole *legitimate* mission of weeding out constitutionally inadequate patent applications.

Patent Office subordination of the patent system to the state law of trade secrets is precluded by the Constitution's "limitation on the states . . . that in regulating the area of patents and copyrights, they do not conflict with the operation of the laws in this area passed by Congress". *Kewanee, supra*, 416 U.S. at ——, 40 L Ed 2d at 324.

As this Court has recognized virtually from the beginning, trivial and undeserving patents preempt the skills essential to the normal "progress of science and the useful arts" and hence are constitutionally precluded.

> " 'To grant a single party a monopoly of every slight advance made, except where the exercise of invention, somewhat above the ordinary mechanical or engineering skill, is distinctly shown, is unjust in principle and injurious in its consequences." *A&P Tea Co.* v. *Supermarket Equipment Corp.*, 340 U.S. 147, 155 (1950), quoting *Atlantic Works* v. *Brady*, 107, U.S. 192, 199-200 (1883). (Mr. Justice Douglas

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[34] [Continued]

When pressed to discharge its burden under § 552(a)(3) to show that *any* abandoned patent application contained a trade secret, the Patent Office, by a post-trial motion, confessed that at most, *only* 24% of abandoned applications *may* contain trade secrets—and so admitted that at least 76% did not. See the Petition in No. 74-584, pp. 11-12, including n. 16.

concurring; the concurring opinion in A&P was adopted in explication of the constitutional patentability standard in *Graham, supra*, and reiterated in *Anderson's Black Rock, supra*.)

"It was never the object of those [patent] laws to grant a monopoly for every trifling device", *id.*, for such monopolies impede the fundamental right of every citizen to the free exercise of ordinary skills in the pursuit of a calling. *Greene* v. *McElroy*, 360 U.S. 474 (1959); see also *Allgeyer* v. *Louisiana*, 165 U.S. 578, 589-590 (1886) and so contravene the substantive due process standard of the Fifth Amendment.[35]

9. These constitutional questions must be squarely faced and promptly resolved in a proper three-judge forum if exemption 3 is afforded the blanket, broad construction requested by the government whereby *all* statutes—including § 122—are qualified "which specifically *require* or *permit* nondisclosure without regard to the circumstances" and "whether or not they specify the particular documents to be kept confidential" (P. Br. 10), thus reducing the "function of the reviewing court to [determing] whether there is a specific statute requiring or authorizing the confidentiality of the material involved" (P. Br. 15). *Hagans* v. *Lavine*, 415 U.S. 528 (1974); *Goosby* v. *Osser*, 409 U.S. 512, 518 (1973).[36]

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[35] See "The Constitutional Standard of Invention—The Touchstone for Patent Reform," 1973 Utah L.R. 653, 672-674.

[36] As recently as February 18, 1975, the Court has pointed out that:

> "We recently stated 'claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purpose of 28 U.S.C. § 2281.' Goosby v. Osser, 409 U.S. 512, 518 (1973)." *Harris County Commissioners Court* v. *Moore*—43 U.S.L.W. 4223, 4224, n. 6.

The Fourth Circuit in No. 74-584 misstated and then, in the guise of pronouncing them insubstantial, adjudicated the merits

CONCLUSION

The decision of the Court of Appeals in No. 74-450 should be affirmed. This Court should follow the lead of Congress to hold that exemption 3 does not broadly include all of the widely different "discretionary" statutes which either permit or require any administrative agency to suppress material from the public. As exemption 3 states in terms, *only* those statutes which themselves "specifically" exempt material are subject to its provisions. The exercise of administrative discretion under other statutes must find sanction in one or more of the other exemptions.

EDWARD S. IRONS

Counsel for Petitioner in No. 74-584.

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of petitioner's constitutional claims—all without a semblance of a "prior decision" which "inescapably renders" them "frivolous" and pointedly without reference to either *Goosby* or *Hagans*. A Request for Reconsideration stressing the appellate court's non-compliance with the rule enunciated in *Goosby* and *Hagans* was summarily denied. See the Petition in No. 74-584, pp. 16a to 19a, and the discussion at pp. 14-18 and 22-28.

The Petition in No. 74-584 is being supplemented to focus more directly on this issue in view of the review granted in No. 74-450, coupled with the February 18, 1975 denial of the Motion to Expedite Consideration of the Petition.

APPENDIX

[SEAL]

OFFICE OF THE SOLICITOR GENERAL

Washington, D.C. 20530
February 21, 1975

Edward S. Irons, Esq.
Irons & Sears
1801 K Street, N.W.
Washington, D.C. 20006

Re: Butterfield, et al. v. Robertson, et al.
(No. 74-450)

Dear Mr. Irons:

As requested in your letter of February 19, 1975, I consent to the filing of a brief *amicus curiae* in the above case on behalf of Mary Helen Sears.

Sincerely,

/s/ Robert H. Bork
Robert H. Bork
Solicitor General

ALAN B. MORRISON

ATTORNEY AT LAW

2000 P Street, N.W., Suite 700
Washington, D.C. 20036

(202) 785-3704

February 21, 1975

Edward S. Irons
Irons & Sears
1801 K Street, N.W.
Washington, D.C. 20006

RE: Butterfield, et al. v. Robertson, et al
No. 74-450

Dear Mr. Irons:

On behalf of the respondents in the above action, I hereby consent to the filing of a brief *amicus curiae* in behalf of Mary Helen Sears in Case No. 74-584.

Sincerely,

/s/ Alan B. Morrison
Alan B. Morrison

ABM:pl

THE CONSTITUTION

ARTICLE 1

SECTION 8, CLAUSES 3 AND 8

The Congress shall have Power . . .

* * * *

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

* * * *

To promote the Progres sof Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

* * * *

ARTICLE VI, CLAUSE 2

* * * *

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * * *

STATUTES INVOLVED

The Freedom of Information Act, as amended, 5 U.S.C. 552, provides in pertinent part:

Section 552. *Public information; agency rules, opinions, orders, records, and proceedings.*

(a) Each agency shall make available to the public information as follows:

* * * *

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records available to any person.

* * * *

(b) This section does not apply to matters that are—

* * * *

(3) specifically exempted from disclosure by statute;

"(c) This section does not authorize withholding of information or limit the availability of records to the public, except as *specifically* stated in this section. This section is not authority to withhold information from Congress."

The Patent Code, Title 35 § 102, (a) and (b) and 122 provides:

§ 102. Conditions for patentability; novelty and loss of right to patent

A person shall be entitled to a patent unless—

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent, or

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States, or

§ 103. Conditions for patentability; non-obvious subject matter

A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made. July 19, 1952, c. 950, § 1, 66 Stat. 798.

§ 122. Confidential status of applications

Applications for patents shall be kept in confidence by the Patent Office and no information concerning the same given without authority of the applicant or owner unless necessary to carry out the provisions of any Act of Congress or in such special circumstances as may be determined by the Commissioner.

* * * *

Section 1104 of the Federal Aviation Act of 1958, 72 Stat. 797, 49 U.S.C. 1504, provides:

Any person may make written objection to the public disclosure of information contained in any application, report, or document filed pursuant to the provisions of this chapter or of information obtained by the Board or the Administrator, pursuant to the provisions of this chapter, stating the grounds for such objection. Whenever such objection is made, the Board or Administrator shall order such information withheld from public disclosure when, in their judgment, a disclosure of such in-

formation would adversely affect the interests of such person and is not required in the interest of the public. The Board or Administrator shall be responsible for classified information in accordance with appropriate law: *Provided*, That nothing in this section shall authorize the withholding of information by the Board or Administrator from the duly authorized committees of the Congress.

EXCERPT FROM SENATOR LONG'S STATEMENT Re S. 1666

Senator Long stated:

"Section 3(*c*) contains the portion of the bill which has been most extensively revised. It requires that all agencies' records be made promptly available except in cases where such records are: (1) *specifically covered by a statutory exemption, as in the case of individual income tax returns;* [See 26 U.S.C. 6103]

* * * *

Section 3(*e*) of S. 1666 states that nothing in this section authorizes the withholding of information nor the limiting of public access to records except as specifically described in the measure. This is substantially the present 5 U.S.C. 22, but is written within the context of this more comprehensive bill. Statutes which curtail the availability of information to the public are not intended to be affected by the enactment of this bill. *They provide that specified records shall not be released unless authorized by law.* Subsection 3(e) is not such an authorization to disclosure. It should be made clear that this bill in no way limits statutes specifically written with the Congressional intent of curtailing the flow of information as a supplement necessary to the *proper functioning of certain agencies.*"

ASSOCIATED PORTION OF S. 1666

"(c) *Agency Records.*—Every agency shall, in accordance with published rules stating the time, place, and procedure to be followed, make its records promptly available except those particular records or parts thereof which are (1) *specifically exempt from disclosure by statute;* (2) specifically required by Executive order to be kept secret for the protection of the national defense; and (3) the internal memorandums of the members and employees of an agency relating to the consideration and disposition of adjudicatory and rulemaking matters. The district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency is situated shall have jurisdiction upon complaint to order the production of any agency records or information improperly withheld from the complainant by the agency and to assess against the agency the cost and reasonable attorneys' fees of the complainant. In such cases the court shall determine the matter de novo and the burden shall be upon the agency to sustain its action by a preponderance of the evidence.

* * * *

"(e) Limitation of Exemption.—Nothing in this section authorizes withholding of information or limiting the availability of records to the public except as *specifically* stated in this section, nor shall this section be authority to withhold information from Congress."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-450

ALEXANDER P. BUTTERFIELD, ADMINISTRATOR, OF THE FEDERAL AVIATION ADMINISTRATION, *et al.*,

Petitioners,

v.

REUBEN B. ROBERTSON, III and JEROME B. SIMANDLE,

Respondents.

BRIEF FOR RESPONDENTS

QUESTION PRESENTED

Is a statute which permits any record in the possession of an agency to be withheld from disclosure whenever the agency determines that disclosure is not required in the public interest, a statute which specifically exempts such records from disclosure within the meaning of 5 U.S.C. §552(b)(3)?

STATUTES INVOLVED

Section 1104 of the Federal Aviation Act of 1958, 49 U.S.C. §1504, provides:

Any person may make written objection to the public disclosure of information contained in any application, report, or document filed pursuant to the provisions of this chapter or of information obtained by the [Civil Aeronautics] Board or the [Federal Aviation] Administrator, pursuant to the provisions of this chapter, stating the grounds for such objection. Whenever such objection is made, the Board or Administrator shall order such information withheld from public disclosure when, in their judgment, a disclosure of such information would adversely affect the interests of such person and is not required in the interest of the public. The Board or Administrator shall be responsible for classified information in accordance with appropriate law: *Provided*, That nothing in this section shall authorize the withholding of information by the Board or Administrator from the duly authorized committees of the Congress.

The Freedom of Information Act, 5 U.S.C. §552, provides in pertinent part:

> §552. **Public information; agency rules, opinions, orders, records, and proceedings.**
>
> (a) Each agency shall make available to the public information as follows:
>
> * * *
>
> (b) This section does not apply to matters that are —
>
> * * *

(3) specifically exempted from disclosure by statute;

* * *

STATEMENT OF THE CASE

The petitioners Federal Aviation Administration ("FAA") and its Administrator, Alexander P. Butterfield, have broad responsibilities for the regulation of the safety of civil aeronautics. Under section 601(a)(3) of the Federal Aviation Act, as amended (the "Aviation Act"), 49 U.S.C. §1421(a)(3), the Administrator "is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce" through the issuance of standards, rules and regulations governing, *inter alia*:

> (A) the inspection, servicing, and overhaul of aircraft, aircraft engines, propellers, and appliances; (B) the equipment and facilities for such inspection, servicing, and overhaul; and (C) in the discretion of the Administrator, the periods for, and the manner in, which such inspection, servicing, and overhaul shall be made . . . .

In performing these functions, the Administrator is directed to "give full consideration to the duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest . . . ." Section 601(b) of the Aviation Act, 49 U.S.C. §1421(b).

Section 605(b) of the Aviation Act, 49 U.S.C. §1425(b), directs the FAA to employ inspectors in order to insure that the equipment of the air carrier is properly maintained

and in safe condition. In carrying out his responsibilities, the Administrator has full power to investigate, obtain information, and require accurate reports from air carriers; failure of an air carrier to comply may result in decertification, or criminal or civil penalties. Sections 609, 901, & 902(e) of the Aviation Act, 49 U.S.C. §§1429, 1471, 1472(e).

In 1966 the FAA instituted a new procedure for surveillance of air carrier maintenance and safety operations, known as the Systemsworthiness Analysis Program or "SWAP."[1] Under this program special teams of highly trained and experienced FAA inspectors make periodic visitations to the certificated air carriers to inspect and analyze their maintenance and safety operations. The SWAP teams seek to identify significant failures and defects in the carriers' systems, procedures, record-keeping, organization, training, and supervision that may adversely affect compliance with applicable regulations and safety standards. The team's findings and recommendations for corrective actions are then fully disclosed to the airline management in a special meeting held for that purpose, and a final SWAP Report is prepared containing the findings and recommendations developed during the inspection.

During the summer of 1970 respondents and others were engaged in a study of airline safety, including an

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[1] The SWAP Program, as applied to air carriers, is set forth in FAA Systemsworthiness Analysis Program Handbook 8000.3B, as reprinted in November 1970, which appears in the Single Appendix in this Court ("A.") at pages 44-111. The FAA has issued a revised version of the SWAP Handbook, FAA Order 8000.3C, dated April 14, 1972, which is reproduced at A. 122-205, with subsequent changes set forth at A. 206-256.

examination of the activities of the FAA. During the course of that study, they made a number of requests to FAA officials under the Freedom of Information Act ("FOIA"), 5 U.S.C. §552, some of which were granted, but most of which were refused .

In August 1970 in accordance with FAA procedures, respondents formally appealed the denial of access to various documents including the SWAP Reports which are at issue here. The following December, while that appeal was still pending before the FAA, certain of the major airlines privately wrote the Administrator through their trade association, the Air Transport Association of America (A. 112-14). In that letter the airlines made a request pursuant to section 1104 of the Aviation Act, 49 U.S.C. §1504, that SWAP Reports be withheld from public disclosure, suggesting that if public disclosure were made, airline management would no longer cooperate with the SWAP program. (A. 112). On February 18, 1971, the Administrator issued a determination under section 1104 that "all SWAP reports in existence or hereinafter to be made" shall be withheld from the public. (A. 115). On February 24, 1971, the FAA wrote to the respondent Simandle denying the appeal for access to SWAP Reports. (A. 29-33).

Respondents were also unsuccessful in obtaining access to the FAA's publications known as Mechanical Reliability Reports (MRRs). These documents contain summaries of reports of serious mechanical malfunctions which are required to be submitted to the FAA by the airlines. The reports concern such problems as in-flight fires, engine shutdowns during flight, landing gear malfunctions, and other aircraft system problems requiring emergency action.

(A. 27, ¶3). The summaries are compiled by the FAA, printed at public expense, and mailed out on a daily basis to a wide audience within the aviation industry. (A. 27, ¶5). Respondents were told by the FAA, however, that the MRRs would not be made available to them without the consent of the Air Transport Association. (A. 14, ¶51). The request for these reports, initially made in August 1970, was definitively rejected by the FAA on April 1, 1971. (A. 7, ¶13).

This action was thereafter commenced in the United States District Court for the District of Columbia, seeking access to both the SWAP Reports and the MRRs. In separate counts respondents also sought various other injunctive relief against, *inter alia*, the charging of excessive fees for inspecting or copying public documents, undue delay in responding to information requests, and other violations of law. (A. 7-17). After the suit was filed, the Administrator issued another *ex parte* order at the request of the Air Transport Association, purporting to withhold the MRRs from public disclosure under the authority of section 1104, just as he had earlier ordered with regard to the SWAP Reports. (A. 18, ¶27, and Affidavit of John H. Shaffer re MRRs and Attachments 3 and 4 thereto).

After issue had been joined, respondents moved for partial summary judgment on the portion of their complaint seeking access to the MRRs and the SWAP Reports. They submitted with their motion a sample SWAP report (A. 34-37), and a typical MRR daily summary (A. 27, ¶5). Thereafter, petitioners cross-moved for summary judgment on that part of the complaint on which respondents had moved, and later moved to dismiss the action in its entirety.

In response to respondents' motion, petitioners claimed that both the SWAP Reports and the MRRs could be withheld under the third and fourth exemptions to the FOIA, 5 U.S.C. §§552(b)(3) (specifically exempted by statute — §1104)[2] and 552(b)(4) (confidential commercial information).[3] (A. 38). In addition, for the SWAP reports respondents claimed that the fifth and seventh exemptions, 5 U.S.C. §§552(b)(5) and 552(b)(7), which applied to intra-agency memorandums[4] and investigatory files compiled for law enforcement purposes,[5] also justified secrecy.

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[2] 5 U.S.C. §552(b)(3) exempts records ". . . specifically exempted from disclosure by statute."

[3] 5 U.S.C. §552(b)(4) exempts ". . . trade secrets and commercial or financial information obtained from a person and privileged or confidential".

[4] 5 U.S.C. §552(b)(5) exempts ". . . inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

[5] At that time, 5 U.S.C. §552(b)(7) exempted ". . . investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency". Since the filing of the petition in this case, that exemption has been amended so that it now exempts:

> Investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation,

(continued)

On November 8, 1972, the District Court entered an Order granting respondents' motion for partial summary judgment and directing that they be granted immediate access to the SWAPs and the MRRs on the same terms and conditions as apply to persons connected with the airline industry. (Appendix to Petition for Certiorari, 19A-20A, hereinafter "App. ___"). That Order also granted the motion of petitioners to dismiss the remaining counts of the complaint. The portion of the Order requiring petitioners to immediately provide respondents with the MRRs and SWAPs was temporarily stayed pending a determination of whether an appeal would be taken. Thereafter, when petitioners decided not to appeal the decision as to MRRs, the stay was lifted for MRRs, but has been continued to date for the SWAPs.

In the Court of Appeals petitioners continued to press their claim that section 1104 was a statute which "specifically" exempts SWAP Reports from disclosure under exemption 3, as well as their contention that exemptions 4, 5 and 7 entitled them to withhold the SWAP Reports from respondents. The Court of Appeals, however, decided only the section 1104 issue, remanding the remainder of the case to permit the District Court to consider the effect of *Weisberg v. Department of Justice*, 489 F.2d 1195 (D.C. Cir. 1973) (en banc), an exemption 7 case, as well as "any

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[5] (continued)

confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel.

Pub. L. 93-502, section 2(b), 88 Stat. 1563 (1974); *See* H.R. Rep. 93-1380, 93d Cong., 2d Sess. 12-13 (1974).

other defense to disclosure [petitioners] may raise except Exemptions (1) and (3)." (App. 13A).

In ruling against petitioners on their claim that section 1104 is a statute which specifically exempts SWAP Reports from disclosure, the Court of Appeals pointed to the absence of any clear definition or description of documents to be covered by it, contrasting this with the "definite class of documents" withheld in *Environmental Protection Agency v. Mink*, 410 U.S. 73, 83 (1973). (App. 4A). It further noted that the FOIA was intended to replace the public interest standard under the prior law with a broad rule of disclosure subject to nine specific exemptions. (App. 8A-9A). It reasoned that to import via section 1104 a public interest test to be applied at the discretion of the FAA and the CAB would frustrate the goals of the Information Act. Based on these reasons, the Court of Appeals concluded that section 1104 was not a statute which "specifically exempted" the SWAP Reports, and thus exemption 3 did not apply. (App. 5A, 12A).

SUMMARY OF ARGUMENT

Exemption 3 permits agencies to refuse to disclose records based on exceptions created by other statutes, rather than on the terms of the other eight specific exemptions created by section 552(b). The question posed by this case is whether section 1104 is one of the statutes included within exemption 3, or more precisely, whether the SWAP Reports are "specifically exempted from disclosure by statute [section 1104]."

Respondents contend that section 1104 is not within the group of statutes that fall under exemption 3 because

it contains none of the characteristics found in those statutes which plainly do create exceptions to disclosure. Thus, section 1104 fails to qualify because

— it does not describe particularized records, but applies to any information in the possession of the FAA or the CAB;

— it does not prohibit the disclosure of any documents, but allows the FAA or CAB the discretion to refuse to disclose any document in their possession;

— it fails to set any standards for determining whether to release a particular document other than the "public interest" test which the FOIA was plainly intended to eliminate.

Both the legislative history of exemption 3 in particular and the FOIA in general support respondents' contention that these three aspects of a statute should be examined in resolving questions as to the applicability of exemption 3. In addition, this Court's decision in *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973), as well as decisions of the various courts of appeals in exemption 3 cases not involving section 1104, support the proposition that in determining whether section 1104 meets the requirements of exemption 3, these three factors should be considered. We do not argue here that the failure to have any one of these traits is itself a sufficient basis for ruling that a statute does not create an exemption from disclosure. However, the absence of all three characteristics is, we submit, fatal to petitioners' claim with respect to section 1104.

In our view, petitioners' attempt to rely on that part of the legislative history of exemption 3 relating to section 1104 is misplaced. The isolated references to section 1104 in the extensive legislative history of the FOIA have been given far greater import by petitioners than the contexts of the references indicate are warranted. In addition, certain other parts of the legislative history — such as the CAB's admission in hearings in 1963 that section 1104 does not fall within exemption 3 — affirmatively support the decision below.

Finally, there is no valid policy reason which has been advanced by petitioners to support a broad exclusion of the FAA and CAB from the FOIA through section 1104, particularly since no such exclusion exists for any other comparable agency. Even petitioners' suggestion that determinations under section 1104 are reviewable in the courts of appeals, does not alleviate the situation because that kind of review would create significant practical problems, would seriously impair the right to *de novo* review under section 552(a)(4)(B),[6] and in those cases where other exemptions are claimed, would create either simultaneous proceedings in a district court and a court of appeals, or would thrust upon the appellate courts the burden of trying all FOIA cases arising out of the FAA and CAB. Indeed, the existence of other exemptions, three of which have been vigorously pressed by petitioners in this case, militates heavily against a conclusion that vital secret records of the FAA and CAB would be jeopardized if the decision below were upheld. Any legitimate interest that petitioners have in keeping the public from examining safety reports on the practices of airlines is adequately protected by

[6] Formerly section 552(a)(3).

the exemptions for confidential commercial and financial information (4), internal agency memoranda (5), or investigatory records compiled for law enforcement purposes (7). Those exemptions are available to the FAA just as they are to every other agency, and if Congress intended to permit the withholding of these SWAP Reports, it should be under the aegis of one of those exemptions rather than through a broad claim of non-disclosure based on section 1104.

ARGUMENT

THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE SWAP REPORTS ARE NOT "SPECIFICALLY EXEMPTED FROM DISCLOSURE BY STATUTE" WITHIN THE MEANING OF EXEMPTION 3.

There is little question that exemption 3 to the FOIA was never intended to overrule those previously enacted statutes which specifically limited public access to certain documents. But all of the legislative history cited by petitioners simply establishes that undisputed proposition, and begs the real question which is whether exemption 3 was intended to apply to section 1104.

The beginning of this analysis is the wording of exemption 3, which covers matters that are "specifically exempted from disclosure by statute; . . ." As the Court of Appeals noted below: "The ordinary meaning of the language of Exemption (3) is that the statute therein referred to must itself specify the documents or categories of documents it authorizes to be withheld from public scrutiny." (App. 4A). *Accord, Cutler v. Civil Aeronautics Board*, 375 F. Supp. 722, 724 (D.D.C. 1974), *appeal pending*, No. 74-1780 (D.C. Cir.).

The overall thrust of the phrase and the use of the words "specifically," "exempted" and "by statute" all suggest a degree of concreteness which section 1104 plainly lacks. Indeed, there is little that is concrete about section 1104, since it applies to any information held by the agencies and can be invoked whenever it is determined that disclosure "is not required in the public interest."[7] The fact is that section 1104 literally does not exempt anything at all, but leaves that job to the agencies, contrary to exemption 3 which requires that non-disclosure be "by statute." What petitioners have done is to construe exemption 3 as though it were written to apply to matters "exempted from disclosure by a specific statute." While the words may be almost the same, the meaning is very different.

Respondents do not, however, rely solely on the wording of exemption 3. Rather, we have also analyzed various statutes plainly falling within exemption 3's coverage and identified three characteristics which are found in varying degrees in all of those statutes. In Point I, we demonstrate that section 1104 fails to meet any of these three traits and for that reason does not qualify under exemption 3. Thereafter, we review the extracts from the extensive legislative

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[7] Section 1104 also provides that the agency must make a "judgment" that release would "adversely affect the interests" of the person requesting non-disclosure. That requirement seems largely redundant because the agency almost necessarily would have to make such a judgment in order to find that release "is not required in the interest of the public." Moreover, the perfunctory showing needed to establish that the release of all SWAP Reports, for all airlines, forever, would "adversely affect" the interests of ATA and its members (A. 112-13), demonstrates that this language adds little to section 1104 or the protection of the public interest. Accordingly, we will treat section 1104 as though it contained only the "in the interest of the public" language.

history which petitioners claim support their case and demonstrate that none of it is helpful to them and that much of it supports respondents. Finally, in Point III, we argue that to bring section 1104 within the third exemption would seriously interfere with the operation of the FOIA and undermine its policies, and that any legitimate interest the agencies have in keeping these records secret can be achieved through the other exemptions that they have claimed.

I. SECTION 1104 IS NOT A STATUTE WHICH IS WITHIN EXEMPTION 3 BECAUSE (A) ITS COVERAGE IS GENERAL AND NOT PARTICULARIZED, (B) IT PERMITS NON-DISCLOSURE AND DOES NOT PROHIBIT DISCLOSURE, AND (C) THERE IS NO MEANINGFUL STANDARD FOR MAKING DETERMINATIONS AS TO DISCLOSABILITY.

A. The Coverage of Section 1104 is Broad and General Rather Than Particularized.

Section 1104 is written in extremely broad terms and permits the non-disclosure of "information contained in any application, report, or document filed pursuant to provisions of this chapter or of information obtained by the Board or the Administrator, pursuant to the provisions of this chapter . . . ." In short, any information in the files of the CAB or the FAA is subject to non-disclosure if petitioners are correct in their interpretation of exemption 3. It is the wholly open-ended nature of section 1104 that distinguishes it from all of the statutes which properly create exemptions under exemption 3. Thus, statutes clearly within the third exemption prohibit disclosure of tax returns (26 U.S.C. §6103), applications for patents (35 U.S.C. §122), documents pertaining to claims arising under the laws administered by the Veterans Administration (38 U.S.C. §3301) and "Restricted Data" (42 U.S.C.

§2162) as defined by 42 U.S.C. §2014(y). While there will inevitably be disputes about the meaning of even well-defined terms,[8] the limitation on access however construed is confined under those statutes to types of documents pre-selected by Congress and is not left entirely to the discretion of the agency, as is true under section 1104.

The legislative history of exemption 3 further supports respondents' contention that the all-inclusive nature of section 1104 disqualifies it as a specific exemption statute under section 552(b)(3). Thus, in 1958 in the Senate hearings, the Subcommittee's Chief Counsel observed that the 80 statutes which limit disclosure would not be affected by the pending legislation, S. 2148 [85th Cong., 1st Sess. (1957)], since subsection (f) of that bill contained an exemption for "subject matter which is (1) specifically exempt from disclosure by statute, . . ." In response, Senator Hruska stated:

> I am glad to know that. It emphasizes even more the point I've tried to make in questioning Mr. Newton. After all, that is a matter of policy when a *specific exception* is made, that is a matter of congressional policy.
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> Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on S. 921 (Part 2), 85th Cong., 2d Sess. 583 (1958) (emphasis added) (hereafter "1958 Senate Hearings").

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[8] *See, e.g., Sears v. Gottschalk*, 502 F.2d 122 (4th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3297 (Nov. 14, 1974) (No. 74-584) (applications for patents).

It is readily apparent that section 1104 does not contain a "specific exception" and that "congressional policy" could not have been involved because Congress had no idea what kinds of documents would be withheld given the open-ended nature of section 1104.

In 1963, two bills which were the forerunners of the FOIA were introduced in the Senate and referred to the Judiciary Committee. These were S. 1663, an all-inclusive revision of the Administrative Procedure Act ("APA"), and S. 1666, which amended only the information portion of the APA, section 3, 5 U.S.C. §1002 (1964). The information sections in both bills were identical and provided that every agency shall make its records promptly available "except those particular records or parts thereof which are (1) specifically exempt from disclosure by statute . . . ." While the phrase "particular records or parts thereof" was not contained in the bill as it became law, there is no indication anywhere of an intent to modify the substance of the bill by dropping that language. *Cf.* Pet. Br. at 18 n. 20.[9] In our view the use of the "particular records" phrase firmly supports our contention that statutes which qualify under the third exemption must describe with considerable particularity the type of records that may be withheld. Moreover, Senator Edward V. Long of Missouri, the Chairman of the Senate Subcommittee from which the FOIA came and a leading proponent of the Act, described the statutes which curtail the availability of information and which would not be affected by the bill, as laws

[9] Likewise, there is no significance in the fact that "exempt" in S. 1663 was changed to "exempted" when reported by the Judiciary Committee. Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary on S. 1663, 88th Cong., 2d Sess. 3 (1964).

that "provide that *specified records* shall not be released unless authorized by law." Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary on S. 1666 and S. 1663 (in part), 88th Cong., 1st Sess. 6 (1963) (emphasis added) (hereafter "1963 Senate Hearings"). Even though the "particular records" phrase was not contained in the bill as reported to the House floor in 1966 (which was the bill as it became law), the portion of the House Report which dealt with the third exemption observed that these statutes "restrict public access to *specific government records.*" H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966) (emphasis added).

Petitioners' response is to point to this Court's decision in *EPA v. Mink, supra,* which dealt with what petitioners assert (Br. 14) is "another similarly structured exemption" to the FOIA, exemption 1, which at that time applied to matters "specifically required by Executive order to be kept secret in the interest of national defense or foreign policy." 5 U.S.C. §552(b)(1) (1970).[10] They quite correctly observe that the Executive order involved in *Mink* did not "specifically" exempt the particular documents sought, or for that matter any others, and that this Court sustained the claim of exemption despite this fact. Therefore, petitioners argue, the absence of any specificity in section 1104 is not fatal to their claim that exemption 3 applies to it.

[10] Public Law 93-502, section 2(a), 88 Stat. 1563 (1974), amended that provision so that it now exempts only matters that are:

> "(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive Order."

Petitioners' attempt to equate the two exemptions, and thereby to gain support from *Mink*, passes over significant differences between the two provisions. First, old exemption 1 and the Executive order were, unlike exemption 3 and section 1104, specific in one important respect: their application was limited to matters of "national defense and foreign policy," a far more limited scope than "any information" in section 1104. *Cf.* 42 U.S.C. §2014(y); 38 U.S.C. §3301. Second, and essential to this Court's decision in *Mink*, was the legislative history which unmistakenly pointed to the conclusion that Congress intended not to permit the disclosure under the FOIA of documents classified on the authority of the very Executive order utilized in *Mink* to withhold the documents. *See* 410 U.S. at 82-83; *Stretch v. Weinberger*, 495 F.2d 639, 641 (3d Cir. 1974).

Finally, we have found no indication in the legislative history that any attempt was made to give the same meaning to an exemption dealing only with national security matters, as that given another exemption which covers an entire range of federal statutes on a variety of subjects. In fact, if Congress had wished to give the identical interpretation to both exemptions, the simplest and most direct way of doing so would have been to add the phrase "or required by Executive order to be kept secret in the interest of national defense or foreign policy" at the end of exemption 3.[11] That was not done, and

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[11] We do agree that once a statute is found to come within exemption 3, the courts may only determine whether the exemption is properly claimed as to the documents sought, but may not examine the wisdom of the Congressional decision to withhold. *See, e.g., Tax Analysts and Advocates v. Internal Revenue Service*, 505 F.2d 350 (D.C. Cir. 1974).

there is no apparent reason why Congress would have wanted to treat two such different subjects in precisely the same manner. Despite the similarity between the two exemptions, the differences in scope, legislative history, and purpose are sufficient to render the holding in *Mink* inapplicable to exemption 3 and section 1104.

Petitioners cite a number of other statutes which they claim fall under exemption 3 and are similar to section 1104. But of these, only two — 15 U.S.C. §78x(b) and 42 U.S.C. §1306(a) — even approach section 1104 in their lack of specificity. Even if they do fall within exemption 3, a point we do not concede, both of them are more specific than section 1104. For instance, section 78x(b) applies only to information contained in an "application, report, or document filed with [the Securities and Exchange] Commission under this chapter." Section 78x(a). The SEC has interpreted that provision to apply only to information in documents "formally filed" with it, *see* 40 Fed. Reg. 4944 n.1 (February 3, 1975), whereas section 1104 extends to "any information" in the possession of the FAA or the CAB. Furthermore, under section 78x(b) only the person who filed the particular document may seek a non-disclosure order, but section 1104 allows any person to object to the disclosure of any information. In this case that distinction is extremely important since the SWAP Reports were all prepared by FAA inspectors, and yet it is the air carriers and their trade association which requested the non-disclosure.

With regard to the other statute, 42 U.S.C. §1306(a), we note that the Third, Fifth, and District of Columbia Circuits have held that it did not specifically create an exemption, and that only the Ninth Circuit, by a two to one vote,

has held to the contrary.[12] Moreover, that provision does have some additional degree of specificity beyond that in section 1104. In a portion of the statute not quoted by petitioners in their brief, section 1306(a) exempts from disclosure "any return . . . filed with the Commissioner of Internal Revenue . . ." before going on to the more general reference to "any file, record, report or other paper, or any information . . . ." Thus, at least as to returns filed with the IRS, section 1306(a) is more specific than section 1104 and thus might arguably create an exemption to that limited degree, particularly in light of the other distinguishing features of section 1306(a) related to the other traits of exemption 3 statutes discussed *infra*.

* * *

The court below was plainly correct in its determination that the statute referred to in exemption 3 "must itself specify the documents or categories of documents it authorizes to be withheld from public scrutiny." (App. 4A). Not only was that interpretation of the words of the third exemption correct, but the legislative history of that provision firmly supports that view, and therefore, section 1104 fails to meet the single most important test of an exemption 3 statute.

B. Section 1104 Does Not Qualify Under The Third Exemption Because It Does Not Prohibit Disclosure, But Only Permits Discretionary Non-Disclosure

Petitioners contend that the third exemption applies regardless of whether the statute prohibits disclosure, permits non-

[12] *Stretch v. Weinberger, supra; Serchuk v. Weinberger*, 493 F.2d 663 (5th Cir. 1974); *Schechter v. Weinberger*, 506 F.2d 1275 (D.C. Cir. 1974). *Contra, People of California v. Weinberger*, 505 F.2d 767 (9th Cir. 1974).

disclosure, or conditions disclosure or non-disclosure on satisfying certain criteria. We agree only to the extent of acknowledging that a statute which does not prohibit disclosure absolutely may still meet the tests of the third exemption. But the failure to prohibit disclosure is one factor that must be considered in determining whether Congress intended the particular statute to come within exemption 3.

Some statutes, such as 22 U.S.C. §987 and 50 U.S.C. §403g, are written in terms that plainly prohibit public access to the documents covered by them. On the other end of the spectrum is section 1104, which equally plainly is not prohibitory, and thus records covered by it are, arguably, for that reason alone not "specifically exempted from disclosure by statute." Indeed, the distinction between prohibitory and non-disclosure language was recognized in the only case which held that section 1306(a) entitled the Government to withhold the nursing home reports sought there. *People of California v. Weinberger, supra,* 505 F.2d at 768:

> We do not believe that Section 1306 was an "authorization for administrative exemption," but if we did we would agree with the conclusion reached in *Stretch*. We think the words of Section 1306, "no disclosure . . . shall be made," are words of congressional exemption which prohibit disclosure and the words "except as the Secretary . . . may by regulation prescribe" are words allowing the Secretary to relax the absolute prohibition enacted by Congress . . . . there is a real difference between a statute in which the congressional words themselves prohibit disclosure and a

> statute which authorizes an administrator to exempt from disclosure. In the latter case the exemption is the creature of the administrator and does not fall within the meaning of the words "specifically exempted . . . by statute." [footnote omitted].

In our view the distinction drawn is a sound one and should be considered, along with the other factors, in evaluating whether a statute comes within the third exemption.[13]

Finally, with regard to section 1104 itself, we note that the absence of any prohibitory language, coupled with the open-ended nature of the information covered by it, has allowed petitioners to claim that all past, present, and future SWAP Reports cause harm to the persons who made

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[13] To support their contention that the third exemption covers statutes permitting discretionary disclosure of information, petitioners refer to 13 U.S.C. §8 which permits discretionary disclosure of limited specified categories of census information. Petitioners state that during the debates on the bill Congressman Moss "agreed that exemption 3 covered information obtained by the Bureau of the Census. 112 Cong. Rec. 13646 [1966]." (Pet. Br. 21). An examination of that debate demonstrates, however, that Congressman Moss agreed only that census material which is exempt from disclosure by a prohibitory statute (13 U.S.C. §9) would not be affected by the FOIA, a proposition with which we are in total accord. There is no mention of 13 U.S.C. §8, nor does petitioners' brief point out the very limited nature of the categories of documents which can be disclosed pursuant to that provision. The discretionary nature of 13 U.S.C. §8 in no way contradicts our position, which is only that a prohibition on disclosure is one factor, albeit an important one, in determining whether the requirements of the third exemption are met.

the non-disclosure request, and that it will never be in the public interest to disclose any of these Reports. Quite apart from the total lack of a factual basis for such a prediction, the result is difficult to square with section 552(b)(3) which applies only when matters are "specifically exempted from disclosure by statute."

C. The Absence Of Any Standards Other Than "the interest of the public" In Determining the Disclosability Of Any Records, Further Establishes That Section 1104 Is Not Within The Ambit of Exemption Three.

The third factor to be considered is whether section 1104 contains appropriate standards for the exercise of such discretion as there may be vested in the Administrator for making withholding decisions. We do not argue that the absence of standards is itself sufficient to disqualify a statute from the reach of exemption three. We do not contend that a provision such as 38 U.S.C. §3301(8), which allows the Administrator of the Veterans Administration to release information concerning a claim where it would "serve a useful purpose", takes the entire statute out of exemption 3 because it is both limited to a specific class of documents and prohibits disclosure, subject to certain exceptions.[14]

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[14] On the other hand, more definite provisions such as section 2162(b) of Title 42, which allows Restricted Data to be released to the public when it can be published "without undue risk to the common defense and security", or 26 U.S.C. §6103(b)(2), which allows certain State officials to inspect tax returns "for the purpose of [the] administration [of the State's tax laws] or for the purpose of obtaining information to be furnished to local taxing authorities as provided in this paragraph", are clearer indications of statutes meeting the requirements of the third exemption.

It was the absence of any standard for determining disclosability that led the Third Circuit in *Stretch v. Weinberger, supra,* to conclude that section 1306(a) was not a proper exempting provision. That court agreed with the contention of the plaintiffs "that the exempting statute must prescribe some basis upon which the Secretary is to decide. Otherwise . . . 'specifically' . . . is surplusage." 495 F.2d at 640. The court further observed that there must be "standards or guides through which legislative judgment would be reflected in the making of administrative exemptions." *Id.* Based on its analysis of the legislative history of the FOIA, the court concluded that "the absence of standards to govern broad agency discretion was the chief evil at which Congress aimed." *Id.* at 641. It was the absence of any standards in section 1306(a) — the Secretary is simply authorized to prescribe exemptions by regulation — which was a key factor in deciding against the government in *Stretch,* and it is also a substantial factor in the present case where the only standard is that disclosure "is not required in the interest of the public."

This Court in *EPA v. Mink, supra,* thoroughly reviewed the legislative history of the FOIA and the reasons that its predecessor provision, section 3 of the APA, "came to be looked upon more as a withholding statute than a disclosure statute." 410 U.S. at 79.[15] This Court observed

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[15] Section 3 of the APA, 5 U.S.C. §1002, provided as follows:

> Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of the agency —
>
> * * *
>
> (c) Public Records — Save as otherwise required by statute, matters of official record shall in accordance

(continued)

that section 3 has been "plagued with vague phrases" such as the public interest and found that the nine exemptions "are plainly intended to set up concrete, workable standards for determining whether particular materials may be withheld or must be disclosed." *Id.* It thereafter cited both the Senate and House Reports, which stated that one of the basic purposes of the FOIA was the abolition of the public interest test, as well as other legislative history supporting this proposition. The legislative history on the intent to abolish the public interest standard is so extensive that respondents concluded that it could be best presented in the separate Addendum A annexed hereto which sets forth the most significant examples. The eleven year legislative history of the FOIA is best summarized in a statement made during the final House debate by Congressman Rumsfeld, a member of the Subcommittee and one of the sponsors of the bill:

> This legislation is intended to mark the end of the use of such phrases as "for good cause found", "properly and directly concerned", and "in the public interest", which are all phrases which have been used in the past by individual officials of the executive branch in order to justify or at least to seem to justify withholding of information that properly belongs in the hands of the public. 112 Cong. Rec. 13654 (1966).

Yet it is apparent that if petitioners' interpretation of exemption 3 and section 1104 prevails, the public interest

[15] (continued)
with published rule be made available to persons properly and directly concerned except information held confidential for good cause found.

test, which Congressman Rumsfeld and others intimately concerned with the development of the FOIA sought to eliminate, will have been resurrected once again. It simply makes no sense, we submit, to bring about indirectly that which Congress worked so long and hard to prohibit directly when it repealed section 3 of the APA.

* * *

This analysis of section 1104 from the point of view of these three factors demonstrates that section 1104 is very different from those statutes that are plainly covered by exemption 3; it contains neither a reference to particularized records, nor an absolute or even qualified prohibition against disclosure, nor does it establish any meaningful tests for determining when a document should be made available to the public. While it may be that none of these factors alone would disqualify a particular statute, the absence of all three demonstrates that section 1104 is not a statute under which any document, including SWAP Reports, is "specifically exempted."[16]

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[16] In *Evans v. Department of Transportation*, 446 F.2d 821 (5th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972), the court in a brief alternative holding ruled that the identity of an informant could be withheld by the FAA under section 1104. The opinion never discussed the question of whether section 1104 is a statute covered by the third exemption; it simply held that the materials sought in *Evans* fell within section 1104. Judged by the exemption 3 portion of the petition for certiorari in *Evans*, which dealt solely with whether the standards of section 1104 had been met (No. 71-698 at 15-16), it appears that the plaintiff simply assumed that section 1104 was covered by exemption three and that the arguments advanced here were never urged upon any court in that case.

II. THE LEGISLATIVE HISTORY RELIED ON BY PETITIONERS DOES NOT SUPPORT THE INCLUSION OF SECTION 1104 UNDER EXEMPTION 3.

In Point I, we relied on portions of the legislative history of the FOIA to establish that there are three criteria by which each statute seeking qualification under exemption 3 must be judged, and we concluded that section 1104 fails to qualify in any of these three categories. We now turn to three arguments that petitioners make (Br. 23-25), none of which is based on the primary legislative history of the FOIA – the committee reports, floor debates, or statements of the bills' sponsors. Two of them are based on materials submitted to congressional committees and included only as appendices to the hearings' records, and the third is premised upon a series of inferences drawn from a list of statutes which does *not* include section 1104 and as to which there is substantial doubt about its relevance in interpreting the third exemption. In our view a close examination of these three items indicates that they do not support petitioners. Moreover, a CAB letter to Congress concerning the FOIA similar to those relied on by petitioners, but not cited by them, supports respondents by its admission that section 1104 is not specific enough to meet the requirements of exemption 3.

The House Report states that "there are nearly 100 statutes or parts of statutes which restrict access to specific government records [which] would not be modified" by exemption 3 (H.R. Rep. No. 1497, *supra*, at 10), thereby suggesting that there might be a list of such statutes which would resolve all questions under the third exemption. The search for such a list, however, has proven unavailing. Petitioners point to a statement in the 1965 House hearings in which Congressman Moss referred to a

1960 list of statutes,[17] entitled Federal Statutes on the Availability of Information, 86th Cong., 2d Sess. (1960) (hereafter "1960 Compilation"), and it is from that list that petitioners seek support for their position. (Br. 24-25).

In the first place section 1104 is not on that 1960 Compilation which Congressman Moss described as "a very comprehensive document." 1965 House Hearings at 20. In addition, at that same point in the hearings, Congressman Moss in an apparent reference to the 1960 Compilation indicated that there were "some 78 statutes which confer authority for withholding of information", *id.*, a different figure from the "nearly 100" mentioned in the 1966 House Report, but a similar total to that advanced by committee counsel in the 1958 Senate Hearings of "around 80 separate statutes." 1958 Senate Hearings (Part 2) at 583. The reliability of any of these lists is further confused by the reference in the Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act 31-32 (1967), where he suggested that the reference to the "nearly 100 statutes" in the House Report was to a 1962 Survey by the Administrative Conference. The conference now asserts that, while the survey was started in 1962, "it was never completed and therefore there is no list of 'nearly 100 statutes'." Addendum B at Add. 14, *cited with approval in Cutler v. CAB, supra,* 375 F. Supp. at 723 n.1. In short, there is no authoritative list of statutes coming within exemption 3, and hence petitioners' argument which is based on an inference to be drawn about a statute which is *not* on the 1960 Compilation, because of

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[17] *See* Hearings Before a Subcommittee of the House Committee on Government Operations (Part 1), 89th Cong., 1st Sess. 20 (1965) (hereafter "1965 House Hearings").

the inclusion on that Compilation of two other statutes which they argue are "similar" to section 1104, should be rejected by this Court.[18]

To support their position on section 1104, petitioners also refer to an exhibit which was appended to the record in the 1958 Senate Hearings held by the Subcommittee on Constitutional Rights. Two days after the hearings were completed, the American Law Division of the Library of Congress transmitted to the Subcommittee an exhibit which listed section 1104 (then 49 U.S.C. §674) as one of the "Miscellaneous provisions imposing restrictions on the release of information." 1958 Senate Hearings (Part 2) at 987, 1017.[19] Because that exhibit did not

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[18] Even if section 1104 were in the 1960 Compilation, that would not be dispositive since three of the four courts of appeals which have considered the inclusion of 42 U.S.C. §1306(a) under exemption 3, have rejected the Government's position (*see* note 12, *supra*), although that provision is included on the 1960 Compilation (p. 266). *See also Grumman Aircraft Engineering Corp. v. Renegotiation Bd.*, 425 F.2d 578, 580 n. 5 (D.C. Cir. 1970) (suggesting that 18 U.S.C. §1905, which is listed in the 1960 Compilation (p. 262), may not fall within exemption 3). Furthermore, the two statutes cited by petitioners in their brief (pp. 24-25) – 26 U.S.C. §6104(a)(1)(B) and 15 U.S.C. §78x(b) – are not similar to section 1104, the latter for the reasons set forth at page 19, *supra*, and the former because it is specifically limited to preventing disclosure of any "trade secret, patent, process, style of work, or apparatus" held by certain tax exempt organizations.

[19] Those Hearings dealt principally with executive privilege and the authority of the executive to withhold information from Congress under the Housekeeping Statute, 5 U.S.C. §22 (now 5 U.S.C. §301). Moreover, none of the Senators or staff who were on the Subcommittee which conducted those hearings served on the Subcommittee on Administrative Practice and Procedure from which the FOI bill emerged and was passed in the 89th Congress. Indeed, only two members of that 1958 Subcommittee were still in the Senate when the FOIA became law.

arrive until after the hearings were concluded, it was never mentioned in them, nor to our knowledge, referred to again in the eight subsequent years that it took Congress to enact the FOIA. Far more damaging, however, is the absence of section 1104 from the 1960 Compilation relied on by petitioners, even though it was prepared by the very same American Law Division of the Library of Congress which compiled the exhibit submitted for the record in the 1958 Senate Hearings. Arguably, section 1104 is a statute which "impos[es] restrictions on the release of information" as the exhibit suggests, but exemption 3 requires that the information be "specifically exempted from disclosure by statute" which is a very different standard. In any event, petitioners' assertion (Br. 23) that "any doubt [of that inclusion] is dispelled by the fact that Section 1104 was listed in an exhibit submitted during the [1958] Hearings" is, to say the least, an overstatement.

Petitioners also claim support (Br. 24) from the CAB's statements to Congress of its understanding that section 1104 was encompassed by exemption 3, and in the fact that this interpretation was never challenged in either House. A further analysis of the relevant facts demonstrates, however, that no such "acquiescence by silence" can be implied here, even if it might be appropriate in other situations. Thus, in the 1965 House Hearings relied on by petitioners, there is no more than a letter from the CAB to the Chairman of the Committee on Government Operations stating that "the Board assumes that the exemption from disclosure covering matters 'specifically exempted *** by statute' would be applicable to its procedures under sections . . . 1104. . . ." 1965 House Hearings at 237.[20] The

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[20] It is also instructive to note that the FAA, one of the petitioners here, wrote to the House Committee on Government Operations at

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basis for that assumption is by no means clear since the 1960 Compilation, which was the only one referred to in those hearings and which Congressman Moss described as a "very comprehensive document" (1965 House Hearings at 20), did not include section 1104. Furthermore, the CAB opposed the pending bill notwithstanding its assumed protection based on section 1104, an opposition which would have been unnecessary if section 1104 created the exemption that the CAB said that it did. Given this state of the record, it is hardly relevant that no "challenge" (Pet. Br. 24) to a letter buried in a hearing record was ever issued by the bill's supporters.

Petitioners' argument with respect to the similar letter written to the Senate is even less persuasive. The letter was written in 1965, the year after the Senate passed S. 1666 which in all material respects was identical to the bill which eventually became the FOIA when it was passed in 1966. Thus, the CAB's letter arrived much too late to be of any significance in understanding the Senate's intention with regard to the third exemption. But far more important is the fact that on October 23, 1963, when the language of exemption three in the bills pending in the Senate

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[20] (continued)
the same time as did the CAB, but surprisingly made no mention of section 1104 in commenting on the pending legislation. 1965 House Hearings at 238. Moreover, the chief complaint that the FAA raised in opposition to the bill was that it eliminated the discretion which the agency had and which it believed was being properly exercised at that time. Yet it is obvious that if the pending legislation, which contained exemption 3 in the same form as finally enacted (*see* p. 17, *supra*), made no changes in the operation of section 1104, the elimination of agency discretion would have been of no concern to the FAA. Thus, it appears that the FAA did not consider section 1104 to afford it any protection under exemption 3.

was virtually identical to the text as finally enacted,[21] the CAB wrote to the Chairman of the Senate Judiciary Committee, with regard to the very problem at issue here:

> Further, it may be argued that the enactment of S. 1666 would have the effect of repealing sec. 1104, since S. 1666 would require the disclosure of records not "specifically exempt from disclosure by statute" and since sec. 1104 is a grant of authority to withhold from disclosure rather than a specific exemption for named records.
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> Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary on S. 1666 and S. 1663 (in part), 88th Cong., 1st Sess. 247 n.1 (1963).

That candid admission by the Vice-Chairman of the CAB casts considerable doubt on petitioners' argument that the legislative history of the FOIA supports the withholding of the SWAP Reports based on section 1104.

III. THE OPERATION OF AND THE POLICIES BEHIND THE FOIA WILL BE ENHANCED BY HOLDING THAT SECTION 1104 IS NOT INCLUDED WITHIN THE STATUTES COVERED BY EXEMPTION THREE.

Petitioners have failed to advance a single reason why Congress would have intended to permit the FAA and the CAB to operate outside of the Freedom of Information Act

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[21] *See* note 9, *supra.*

by establishing their own public interest standards for determining whether any document should be disclosed to the public. Especially in light of the clear congressional intent to eliminate the public interest standard from determinations on disclosability of public records (*see* Addendum A), the absence of any affirmative history to support the inclusion of this standard for just these two agencies through section 1104 is solid evidence that Congress never intended these two agencies to be treated differently than all the others. Petitioners have asserted that "each nondisclosure statute was enacted by Congress after balancing the need for public access to information against the need for confidentiality with respect to a particular agency" (Br. 22), yet they have failed to show any special need for confidentiality in these two agencies. Nor have they shown that Congresss made the kind of particularized balancing which this Court recognized in *EPA v. Mink, supra*, 410 U.S. at 80, as the basis for creating all FOIA exemptions. Indeed, Congress could not have done so with section 1104 because of the open-ended nature of the documents covered by it and inclusion of the broad public interest standard. Other agencies are also concerned with safety and economics for other modes of transportation, but not one of them has a provision similar to section 1104. Furthermore, knowledge of how the FAA and CAB are carrying out their vital safety and economic duties is of paramount importance to hundreds of millions of airline passengers.[22]

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[22] The FAA's duties include overseeing the operations of airports, giving directions to air controllers, pilots, and navigators, and issuing air safety standards for aircraft. While the role of the CAB is less a matter of life and death than the FAA's, its impact on the economics of the airline industry and the travelling public is a significant factor in the overall transportation pattern in this country. *See* pp. 3-4, *supra*.

Petitioners, however, argue that an affirmance of the decision below "would impair the Federal Aviation Administration's ability properly to perform its investigative functions" (Br. 11), and would seriously interfere with its ability "to prevent or correct unsafe conditions before an accident occurs." (Br. 26). According to petitioners, if the holding below is sustained, "the SWAP program will be seriously impaired" *Id.* These assertions assume that section 1104 is the only defense available to petitioners in the action. But the FAA, like every other law enforcement agency, may protect its investigatory records to the extent that Congress has authorized in exemption 7. Furthermore, if the information is confidential and commercial, as it may be for some records of the CAB, exemption 4 offers significant protection from disclosure. Finally, of particular interest here since the documents sought are internally generated, exemption 5 protects intra-agency memoranda, a defense which has also been vigorously pressed by petitioners. To the extent that any protection is required from public disclosure of the SWAP Reports, they are provided ample shelter by the other specific exemptions without resorting to the broad sweep of section 1104.

In fact, the existence of other exemptions produces major practical problems if the view of petitioners as to the scope of section 1104 and its relation to the FOIA prevails. Petitioners acknowledge in this Court (Br. 26 n. 26) that judicial review is not foreclosed by section 1104, but they argue that citizens can seek redress only in a court of appeals pursuant to 49 U.S.C. §1486. Under that approach the court of appeals would have to evaluate the agency's public interest determination, a result that would be in conflict with the Congressional purpose "to set up

concrete, workable standards for determining whether particular material may be withheld or must be disclosed." *EPA v. Mink, supra,* 410 U.S. at 79. Moreover, the determination in this case, as is often true, was *ex parte;* the order included future as well as past SWAP Reports and even was extended to airlines that were not included in ATA's request. But without a meaningful administrative record to justify such an all-inclusive order, respondents' right to judicial review would be almost useless.[23]

The existence of other exemptions creates further practical problems. Would those exemptions be heard in the court of appeals, and if so would there be a *de novo* determination, including a trial on factual matters such as those raised under claims of the fourth exemption. *See, e.g., National Parks & Conservation Association v. Morton,* 498 F.2d 765 (D.C. Cir. 1974). And if the other issues were not to be determined in the first instance by the court of appeals, would there be a bifurcated proceeding under which some exemptions would be tried in one court and others in another court, and if so, which court would make which determination first? While it is possible that those issues could be sensibly resolved if it were necessary, there is no reason to believe that Congress ever intended to establish such a procedural quagmire when it included exemption 3 in the Freedom of Information Act. Given these illogical results, the proper method of eliminating them is by specifically excluding section 1104 from exemption 3.[24]

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[23] Petitioners do not indicate whether the FOIA's right to *de novo* review or the more limited review under section 1486 would apply in these cases.

[24] It is true that statutes should not normally be interpreted to be repealed by implication and that it is preferable to construe a

(continued)

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals with respect to section 1104 should be affirmed, and the case remanded to that Court for further proceedings with respect to the other exemptions claimed by petitioners.

Respectfully submitted,

ALAN B. MORRISON
LARRY P. ELLSWORTH
MARK H. LYNCH

Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Respondents

March, 1975

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[24] (continued)
statute such as exemption 3 to permit the other provision (section 1104) to have continuing vitality. In our view section 1104 is not stripped of all meaning but continues to have applicability with respect to those records which the exemptions to the FOIA permit the FAA or CAB to withhold, but which the agency is considering exercising its discretion to release. In such instances, section 1104 establishes a procedure under which the agency can be asked to exercise its discretion not to release those documents which are neither mandatorily disclosable, nor whose public dissemination is prohibited. *See Charles River Park "A", Inc. v. Department of Housing and Urban Development*, ___ F.2d ___, No. 73-1930 (D.C. Cir., March 10, 1975).

ADDENDUM A

THE LEGISLATIVE HISTORY OF THE DEMISE OF THE PUBLIC INTEREST STANDARD FOR WITHHOLDING AGENCY RECORDS

One of the dominant themes throughout the eleven year history of the Freedom of Information Act was the need to extirpate the phrase "secrecy in the public interest" which had been largely responsible for section 3 of the Administrative Procedure Act, 5 U.S.C. §1002 (1964),* becoming more of a withholding statute than a disclosure statute. *See Environmental Protection Agency v. Mink*, 410 U.S. 73, 79 (1973). Thus, the Senate Report on the FOIA stated:

> Section 3 of the Administrative Procedure Act, that section which this bill would amend, is full of loopholes which allow agencies to deny legitimate information to the public. Innumerable times it appears that information is withheld only to cover up embarrassing mistakes or irregularities and the withholding justified by such phrases in section 3 of the Administrative Procedure Act as — "requiring secrecy in the public interest," . . . .

---

* "Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency –

* * *

(c) Public Records – Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found."

> It is the purpose of the present bill to eliminate such phrases, to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language . . . . S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965).

Criticism of the "public interest" standard began in 1955 when the House established the Special Subcommittee on Government Information to examine problems of Executive Branch withholding. At the first hearing of that Subcommittee, counsel for the American Society of Newspaper Editors testified that one of the principle problems was "language so loose, vague and destitute of standards as to constitute vertiable caves of the winds wherein the weathervane of departmental and administrative interpretations and discretions have free scope to veer about." Hearings before a Subcommittee of the House Committee on Government Operations on the Availability of Information from Federal Departments and Agencies (Part 1, Panel Discussion with Editors, *et al.*), 84th Cong., 1st Sess. 11 (1955). In particular, the witness identified section 3 of the APA as a source of the difficulty:

> There are no definitions or standards concerning the term "public interest" but it evidently does not mean national defense or security or Congress would have said so . . . . As the American Law Section of the Library of Congress has pointed out, the "several qualifications in that act have enabled agencies to assert the power to withhold practically all the information they do not see fit to disclose." *Id.* at 12.

The attempt to eliminate the public interest standard continued the following year:

> Does the exception of "any function of Government requiring secrecy in the public interest" create or recognize an administrative discretion to withhold anything the agency believes it would be contrary to the public interest to disclose? I think this exception enlarges the area of sanctioned secrecy in that it permits administrative discretion to suppress in this area.
>
> Statement of Harold Cross, Counsel, American Society of Newspaper Editors, Hearings before a Subcommittee of the House Committee on Government Operations on the Availability of Information from Federal Departments and Agencies (Part 3, Panel Discussion with Legal Experts), 84th Cong., 2d Sess. 447 (1956).

Professor Bernard Schwartz testified:

> In the first place, there is the broad exception at the beginning of section 3 of the Administrative Procedure Act, making all its provisions — of course including the subdivision [3(c)] — inapplicable "to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency." It is not contended that some such exception to the public information section of the act is not necessary.

> One wonders, however, whether it is not too broadly drawn; under it, the departments and agencies can, if they wish, immunize any function from public inspection simply by asserting that the public interest requires it.
>
> * * *
>
> . . . the Administrative Procedure Act should be amended to make it clear that the qualifications in the law are not intended to enable agencies to withhold practically all information they do not see fit to disclose. *Id.* at 459-60.

See also id. at 477 (testimony of John B. Gage); *id.* at 512 (colloquy between Congressmen Moss and Meader and witnesses); *id.* at 559 (colloquy between Congressman Meader, Committee counsel, and witnesses).

Legislation to amend section 3 of the APA was introduced in 1957. H.R. 7174, 85th Cong., 1st Sess.; S. 2148, 85th Cong., 1st Sess. Senator Hennings, the author of S. 2148, explained his bill:

> Part of the explanation for this perversion of section 1002's original purpose seems to lie in the way the section presently reads. Some of its terms and phrases are vague and undefined, giving agency officials wide latitude in interpreting and applying them. Included among these terms and phrases are: (1) "any function . . . requiring secrecy in the public interest."
>
> * * *
>
> The amendments now proposed are

> aimed at tightening the language of section 1002 by replacing those loose terms and phrases with language of more definite meaning, and making it clear beyond any doubt that the basic purpose of the section is to insure the dissemination of the maximum amount of information reasonably possible.

103 Cong. Rec. 7492 (1957).

Supporters of this precursor of the FOIA welcomed the proposal to replace "secrecy in the public interest" and other "woolly" phrases with specific exemptions. Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on S. 921 and the Power of the President to Withhold Information from the Congress (Freedom of Information and Secrecy in Goverment), 85th Cong., 2d Sess. 539, 697, 739, 754, 757 (1958) (statements, letters, and editorials from Sigma Delta Chi Professional Journalistic Fraternity, the San Diego Evening Tribune, the Buffalo Courier Express, the Ithaca Journal, and the Chairman of the Ohio Wesleyan University Department of Journalism). Again in 1959, Senator Hennings introduced FOI legislation (S. 186, 86th Cong., 1st Sess.) with a nearly identical statement to the one he had made on S. 2148. 105 Cong. Rec. 402-03 (1959). And when Senator Carroll introduced an FOI bill in 1961 (S. 1567, 87th Cong., 1st Sess.), he commented: "Section 3 [of the APA] presently excepts from its publication requirements 'any function of the United States requiring secrecy in the public interest' . . . . These phrases are eliminated as being too ambiguous." 107 Cong. Rec. 5604 (1961).

Work on an FOI bill began in earnest in the Senate in the 88th Congress. Once again both witnesses and Senators decried the public interest standard — "the language that has plagued Congress and litigants ever since the law [the APA] passed." Testimony of the Dean of the University of Missouri School of Journalism, Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary on S. 1666 and S. 1663, 88th Cong., 1st Sess. 10 (1963).* *See also id.* at 48 (statement of Senator Metcalf); *id.* at 56 (testimony of witness appearing on behalf of American Newspaper Publishers Association); *id.* at 62 (testimony of witness appearing on behalf of American Society of Newspaper Editors); *id.* at 155, 157 (testimony of witness appearing on behalf of the American Bar Association).

Indeed, the course of S. 1663 and S. 1666 reveals how utterly repugnant Congress considered any use of the public interest standard in making determinations as to the availability of agency records. These bills were structured so that subsection (a) of section 3 dealt with information to be published in the Federal Register; subsection (b) dealt with agency opinions, orders, and rules; and subsection (c) dealt with agency records. Each subsection had its own self-contained set of exemptions. One of these in subsection (a) exempted "any function of the United States requiring secrecy in the public interest." The Committee Counsel explained that this language had been left intact from section 3 of the APA because "there have been virtually no criticisms of what has been included in the Federal Register, and most of the criticisms that there have been is that there has been too much in it, rather than too little." *Id.* at 113.

* S. 1663 was an overall revision of the APA; S. 1666 dealt only with public information and was identical to section 3 of S. 1663.

Despite this benign motivation and the fact that the secrecy in the public interest clause was applicable only to Federal Register publication, the inclusion of this language anywhere in an FOI bill was vigorously opposed. The witness who elicited Committee Counsel's explanation replied:

> I just am not happy about using that criteria "public interest" as being some sort of criteria for determination by administrators. It is subject to abuse. *Id.*

See also id. at 36 (statement of Senator Ervin); *id.* at 61 (testimony of witnesses appearing on behalf of American Society of Newspaper Editors); *id.* at 155, 157 (testimony of witness appearing on behalf of the American Bar Association). These protests were well received; on April 20, 1964, the Subcommittee released a revised Committee Print of S. 1663 which deleted "secrecy required in the public interest" in subsection 3(a). Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary on S. 1663, 88th Cong., 2d Sess. 2 (1964).

Although this episode marked the last time that the public interest standard was included in proposed FOI legislation, proponents of its elimination continued to press their views on Congress. When the House Subcommittee held hearings in 1965, Congressman Moss engaged in the following colloquy with the witness representing the American Bar Association:

> Mr. Moss. It seems to me that after 10 years of rather careful consideration of this problem that there is never difficulty in finding it in the public interest to withhold for good cause found. There is a tent large enough to contain everything. . . .

> Mr. Benjamin . . . . we are of course delighted to see that phrases like "in the public interest" or "for good cause" are not in this bill, nor were they in S. 2335 or the Senate bills.
>
> These get down to deal with particular reasons for allowing nondisclosure in specific kinds of cases where that is justified.
>
> Mr. Moss. It has been suggested we should go back to "public interest" or "for cause." But actually, we could change it and say "for any reason," could we not?
>
> Mr. Benjamin. Just about —
>
> Hearings before a Subcommittee of the House Committee on Government Operations on H.R. 5012, *et al.* (Part I), 89th Cong., 1st Sess. 104 (1965).

The witness appearing on behalf of the American Society of Newspaper Editors commented:

> We feel . . . that it [H.R. 5012] narrows the discretion, and properly so, which the administrative agencies could exercise.
>
> One of the lessons that has become increasingly apparent to us in experience with the Administrative Procedure Act in particular is that too much discretion was left in the hands of the individual agencies.
>
> * * *
>
> We feel the ambiguous phrases in the act provide, as I indicated earlier, too much discretion, not too little, and we feel that the

> legislation of the general type which is being considered here . . . narrows the discretion. *Id.* at 125-26.

See also Hearings before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary on S. 1160, *et al.*, 89th Cong., 1st Sess. 131, 513 (1965) (representatives of the American Society of Newspaper Editors and the American Newspaper Publishers Association).

The House and Senate Reports on the FOIA reflected the views of the witnesses cited above. Among the three purposes of the Act cited by the House Report was the intention to establish "workable standards for the categories of records which may be exempt from public disclosure, replacing the vague phrases 'good cause found,' 'in the public interest' and 'internal management' with specific definitions of information which may be withheld." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 2 (1966). In contrast, the problems with the old APA were summarized in this way:

> In a sense, "public information" is a misnomer for 5 U.S.C. 1002, since the section permits withholding of Federal agency records if secrecy is required "in the public interest" . . . . The present statute, therefore, is not in any realistic sense a public information statute. *Id.* at 5.

The Senate Report is just as explicit:

> Under the present section 3, any Government official can under color of law withhold almost anything from any citizen under the vague standards — or, more precisely, lack of standards — in section 3. It would require almost

> no effort for any official to think up a reason why a piece of information should be withheld (1) because it was in the public interest . . . . S. Rep. No. 813, *supra*, at 5.
>
> The phrase "public interest" in section 3(a) of the Administrative Procedure Act has been subject to conflicting interpretations, often colored by personal prejudices and predilections. It admits of no clear delineations, and it has served in many cases to defeat the very purpose for which it was intended — the public's right to know the operations of its Government. Rather than protecting the public's interest, it has caused widespread public dissatisfaction and confusion. Retention of such an exception in section 3(a) is, therefore, inconsistent with the general objective of enabling the public readily to gain access to the information necessary to deal effectively and upon equal footing with Federal agencies. *Id.* at 8; *see id.* at 3 (Add. 1-2, *supra*).

The floor statements of the proponents of the bill show just as clearly as the Reports that the public interest test was eliminated because it is an insufficient standard for withholding information. Congressman John Moss, the Chairman of the House Subcommittee on Foreign Operations and Government Information and principal sponsor of the FOI bill, called the "secrecy in the public interest" clause and other vague phrases in section 3 of the APA "the warp and woof of the blanket of secrecy which can cover the day-to-day administrative actions of the Federal agencies," 112 Cong

Rec. 13642 (1966). He went on to list three major changes which the FOI bill would make in the law, one of which would be to "set up workable standards for the categories of records which may be exempt from public disclosure, replacing the vague phrases 'good cause found,' 'in the public interest,' and 'internal management' with specific definitions of information which may be withheld." *Id.*

Congressman Reid of New York, who was also a member of the Subcommittee and had introduced an FOI bill identical to the Moss bill, regarded the secrecy in the public interest clause as the most important of the qualifications to section 3 which had vitiated its usefulness as a public information statute. *Id.* at 13646. Congressman Fascell, also a sponsor of FOI legislation, commented:

> The whole of section 3 may be rendered meaningless because the agency can withhold from the public such information as in its judgment involves "any function of the United States requiring secrecy in the public interest." This phrase is not defined in the law. . . .
>
> * * *
>
> Under the protection of these vague phrases, which they alone must interpret, agency officials are given a wide area of discretion within which they can make capricious and arbitrary decisions about who gets information and who does not. *Id.* at 13649.

The most forceful statement in the debate on this issue was offered by Congressman Rumsfeld, another member of the Subcommittee and sponsor of an FOI bill: "This legislation is intended to mark the end of the use of such phrases as 'for good cause found,' 'properly and directly

concerned,' and 'in the public interest,' which are all phrases which have been used in the past by individual officials of the executive branch in order to justify, or at least to seem to justify the withholding of information that properly belongs in the hands of the public." *Id.* at 13654. *See also id.* at 13643 and 13656 (statements of Congressmen King and Rosenthal).

This overwhelming legislative record was conclusively confirmed by a vote of 308-0 in the House of Representatives. *Id.* at 13661. The Senate bill was passed by voice vote both in 1964, 110 Cong. Rec. 17668 (1964), and again in 1965, 111 Cong. Rec. 26821 (1965). Neither of these bills contained any remnant of the public interest standard.

ADDENDUM B

ADMINISTRATIVE CONFERENCE
OF THE UNITED STATES
2120 L Street, N.W., Suite 500
Washington, D.C. 20037

OFFICE OF THE
CHAIRMAN

March 15, 1974

MEMORANDUM

TO: All Staff Attorneys

FROM: John F. Cushman /s/ JFC
Executive Director

SUBJECT: Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act – CORRECTION

At the bottom of page 31 of the subject report the following statement appears:

> "Explaining exemption (3) the House report, at page 10, notes that there are 'nearly 100 statutes or parts of statutes which restrict public access to specific Government records. These would not be modified by the public records provisions of S. 1160.'
>
> "The reference to 'nearly 100 statutes' apparently was inserted in the House report in reliance upon a survey conducted by the Administrative Conference of the United States in 1962. This survey concluded that there were somewhat less than 100 statutory provisions which specifically exempt from disclosure, prohibit disclosure except as authorized by law, provide for disclosure only

as authorized by law, or otherwise protect from disclosure."

This statement is incorrect in that the Administrative Conference of 1962 never conducted the survey referred to. The statement was inserted in the belief that Mr. David C. Eberhart, a member of the 1962 Conference and Director of the Federal Register, GSA, had made such a survey. While he did begin such a survey, it was never completed and therefore there is no list of "nearly 100 statutes."

I bring this to your attention because we receive requests for this non-existent information fairly regularly.

APR 4 1975

No. 74-450

Denied 4-14-75

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

ALEXANDER P. BUTTERFIELD, ADMINISTRATOR OF THE FEDERAL AVIATION ADMINISTRATION, ET AL
Petitioners

v.

REUBEN B. ROBERTSON, III and JEROME B. SIMANDLE
Respondents

MOTION PURSUANT TO RULE 44(7) FOR LEAVE TO PRESENT ORAL ARGUMENT

EDWARD S. IRONS
1801 K Street, N.W.
Washington, D.C. 20006
Attorney for Mary Helen Sears

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

IN THE

Supreme Court of the United States

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ALEXANDER P. BUTTERFIELD, ADMINISTRATOR OF THE FEDERAL AVIATION ADMINISTRATION, ET AL
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v.

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Respondents

MOTION PURSUANT TO RULE 44(7) FOR LEAVE TO PRESENT ORAL ARGUMENT

Under the provisions of Rule 44 (7), counsel for amicus curiae, Mary Helen Sears, petitioner in No. 74-584, respectfully requests leave to present oral argument not in excess of fifteen (15) minutes in length.[1]

Such argument will, it is believed, provide assistance to the Court not otherwise available for the following reasons:

1. Petitioners and respondents are at one in urging that exemption 3 be accorded a breadth and sweep in-

---

[1] The Brief Amicus Curiae of Mary Helen Sears was filed, with the consent of the parties, on March 17, 1975.

consistent with the very purpose and existence of the FOI Act.[2]

Absent the requested argument, the Court will hear only an essentially one-sided view of the question presented with petitioners and respondents differing as to the narrow issue of whether § 1104 of the FAA Act "specifically exempts" certain "SWAP reports" from public disclosure but concurring on the general principle that exemption 3 blankets virtually *all* specific nondisclosure statutes. In consequence, the Court may inadvertently be misled into devitalizing the FOIA by interpreting exemption 3 so as to restore to government agencies the broad discretion to withhold and suppress information which Congress intended the FOIA to destroy.

2. Amicus is particularly qualified to present argument on the reasons why the FOIA's exemption 3 is to be strictly and narrowly construed to curb the exercise of agency discretion in suppressing information. Amicus has presented the identical question in the co-pending petition in No. 74-584, disposition of which has been deferred. In No. 74-584, the "nondisclosure" statute at issue is 35 U.S.C. § 122, which differs widely from § 1104 of the Federal Aviation Act involved in this case.

3(a). The petitioners have stated that the

> ". . . issue presented in our petition broadly involves the scope of exemption 3 itself and not merely its application to the particular . . . statute involved in this case.

---

[2] Petitioners seek an affirmative answer to the single question presented:

> "Exemption 3 of the Freedom of Information Act provides for nondisclosure of 'matters that are specifically exempted from disclosure by statute'. The question is whether this exemption covers all material with respect to which Congress by statute has provided for nondisclosure upon various terms, including statutes that give government officials discretion to decide whether to disclose."

> "The question we are asking the Court to decide is whether exemption 3 applies to all specific non-disclosure statutes. . . . If our view of exemption 3 is sustained . . . it will largely resolve the issue of its application to nearly 100 statutes which provide in various ways for the confidential treatment of government material." (Reply Memo Supporting Petition in No. 74-450, pp. 1-2)

Petitioners include both § 1104 and 35 U.S.C. § 122 in the "nearly 100" to which exemption 3 is said to apply.

(b). The respondents have fashioned a synthetic "three criteria" test, devoid of judicial and legislative support, by which they say those statutes that "specifically exempt" documents from disclosure under exemption 3 may be identified. Respondents have applied this synthetic test to suggest that § 1104 is unique in not meeting any of these criteria, and hence falls outside the ambit of exemption 3. At the same time, by ignoring the actual language of 35 U.S.C. § 122 and focusing upon an oversimplified, out-of-context interpretation of it (R. Br. 14-15), respondents have concluded that § 122 meets the "three criteria" test and is clearly a statute that "specifically exempts" as required by exemption 3.

(c) Respondents' artificial "three-criteria" test for qualifying a statute as one which "specifically exempts" under exemption 3, contemplates that *all* statutes which exhibit at least two of the following three criteria are within exemption 3: (i) "describe particularized records,", (ii) "prohibit the disclosure of any documents" rather than allowing the agency "discretion to refuse to disclose", or (iii) "set . . . standards for determining whether to release a document other than the 'public interest' test" (R.Br. 10).

Respondents state that they have

> "analyzed various statutes plainly falling within exemption 3's coverage and identified three characteristics which are found in varying degrees in all of those statutes. . . ." (R.Br. 13)

and that

> "It is the wholly open-ended nature of section 1104 that distinguishes it from all of the statutes *which properly* create exemptions under exemption 3. Thus, statutes clearly within the third exemption prohibit disclosure of . . . applications for patents (35 U.S.C. § 122). . . . While there will inevitably be disputes about the meaning of even well defined terms, the limitation on access . . . is confined under those statutes to types of documents preselected by Congress and is not left entirely to the discretion of the agency, as is true under § 1104." (R. Br. 14-15)

In fact, § 122 is at least equally as "open ended" as § 1104. The convenient interpretation of § 122 by respondents as defining precisely a class of documents—"particularized records"—preselected by Congress is misleading.

This fact is apparent from a consideration of the actual pertinent language of the two statutes in tandem:

(i) Respondents' first criterion—description of "particularized records".

The "confidence" or "limitation on access" provisions of § 122, subject to the conditions recited in that statute, extend to

> "Applications for patents . . . *and* . . . *information concerning the same*"

i.e., essentially *all* "information" in Patent Office files and custody—hardly a description of "particularized records".

Similarly, § 1104's "limitation on access" applies, subject to conditions recited therein, to

> "information contained in *any application, report or document filed . . . or of information obtained* by the Board or the Administrator. . . ."

—again, essentially all "information" in the custody of the agency.

Thus, contrary to R.Br. 15, neither § 122 nor § 1104 recites in "well defined terms . . . types of documents preselected by Congress". § 122's "limitation on access" to "applications for patents . . . *and* information concerning the same" manifestly does not satisfy this prerequisite any more than § 1104's limitation on access to "information contained in . . . documents . . . or obtained . . .".

(ii) A similar situation applies to respondents' point (ii), *i.e.*, a prohibition on "disclosure of any documents" rather than allowing the agency "discretion to refuse to disclose".

Under *both* statutes, the limitation on access is left to "the discretion of the agency". *Neither* statute *prohibits* "the disclosure of any documents".

Thus, under § 122, the access may be had to applications and information

> ". . . in such special circumstances as may be determined by the Commissioner"

—*i.e.*, in his unbridled discretion.

Under § 1104, access may be had to documents and information *except*

> ". . . when in their [the Board's or Administrator's] *judgment* a disclosure would adversely affect the in-

> terests of such [objecting] person and is not required in the interests of the public"

—again, in agency discretion.

(iii) With regard to respondents' point (iii), *i.e.*, the setting of "standards for determining whether to release . . . other than the 'public interest' test", § 122 does not even attempt to suggest *what* "special circumstances" may guide the exercise of agency discretion. The FAA Act's § 1104 embodies the "public interest" test by requiring a balancing of the objecting party's interest against that of the public but sets no other standard.

In short, respondents' "three-criteria" test is not only artificial, but any careful consideration leads to the conclusion that 35 U.S.C. 122 when judged by its "criteria" is in the very same relative posture as § 1104 of the FAA.

4. § 122 differs fundamentally from § 1104 in that it *prohibits* the exercise of agency discretion to justify *withholding* of any "applications for patent . . . and . . . information concerning the same", disclosure of which is

> ". . . necessary to carry out the provisions of any act of Congress".

This important and unique provision, ignored by the court below, by the government in opposing the petition in No. 74-584 and by respondents' three-criteria test, must be construed, *inter alia*, in light of the later enacted FOIA itself to ascertain whether § 122 and similarly worded statutes *can* fall within exemption 3.

5. Neither petitioners nor respondents have come to grips with the fundamental point which militates *against* the sweep they attribute to exemption 3—*i.e.*, that Congress intended by enacting the FOIA to superimpose *pro tanto* upon *all non*disclosure statutes that ostensibly afford agencies discretion to withhold information the

guidelines for its exercise that are expressed in exemptions 1-9 of the FOIA itself and otherwise to prohibit exercise of agency discretion in favor of withholding information.

By this interpretation which is the only one consonant with the legislative history of the FOIA, neither § 122 nor § 1104 nor most others of the "100" statutes "specifically exempt" documents from disclosure within the narrow meaning of exemption 3. This significant—we believe controlling—point, *should* be heard and weighed in order to resolve the question presented in this case.

Respectfully submitted,

EDWARD S. IRONS
1801 K Street, N.W.
Washington, D.C. 20006

Attorney for Petitioner
in No. 74-584

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-450

JAMES E. DOW, ACTING ADMINISTRATOR OF THE FEDERAL AVIATION ADMINISTRATION, ET AL., PETITIONERS

v.

REUBEN B. ROBERTSON, III AND JEROME B. SIMANDLE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

---

1. Respondents contend that the exemption from disclosure in exemption 3 of the Freedom of Information Act for material "specifically exempted from disclosure by statute" is applicable only if the nondisclosure statute satisfies one or more of these criteria:

(a) it must identify particular records that are to be kept confidential and cannot describe them in broad general terms (Br. 10, 14-20);

(b) it must itself prohibit disclosure and cannot make disclosure turn upon the discretionary judgment of an official or agency (Br. 10, 20-23);

(c) it must provide standards governing disclosure that are more specific than the public interest (Br. 10, 23-26).

Although respondents acknowledge that exemption 3 "was never intended to overrule those previously enacted statutes which specifically limited public access to certain

documents" (Br. 12), they contend that Section 1104 of the Federal Aviation Act is not one of those statutes that exemption 3 was intended to preserve because Section 1104 does not meet any of the foregoing three criteria.

There is nothing in either the language or legislative history of exemption 3, however, which supports the gloss which respondents would place upon the simple phrase "specifically exempted from disclosure by statute." To the contrary, as set forth in our opening brief (pp. 17-22), the legislative history shows that Congress was aware that there was a large number of statutes providing for confidential treatment of government records, and that it intended to continue them in effect.[1] In the words of the House Committee Report on the Freedom of Information Act, the "nearly 100 statutes or parts of statutes which restrict public access to specific Government records * * * would not be modified by the public records provision of S. 1160 [the Senate Bill that was enacted as the Freedom of Information Act]" (H. Rep. No. 1497, 89th Cong., 2d Sess., p. 10).

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[1]All this legislative history relates to bills which contain the same language as exemption 3, except that the 1958 bill used the words "specifically exempt from disclosure by statute" whereas exemption 3 as enacted uses the word "exempted" in that phrase. As respondents acknowledge (Br. 16, n. 9), this minor change had "no significance."

The remarks of Senator Hruska, which respondents cite (Br. 15), confirm that the word "specifically" in exemption 3 refers to specific statutory authority and not to the specification of documents in the nondisclosure statute.[2] In response to a prior question by Senator Hruska, the Subcommittee's chief counsel stated:

> Mr. Chairman, I invite Senator Hruska's attention to the fact that we have located around 80 separate statutes providing for limiting information to be disseminated in many different categories, and none of those are affected by this particular amendment and this particular statute. So if there is specific authority in a statute, to an agency, executive department, or service or board or commission, it will not be affected by this amendment or this statute.
>
> Senator Hruska: I am glad to know that. It emphasizes even more the point I tried to raise in questioning Mr. Newton. After all, that is a matter of policy. When a specific exception is made, that is a matter of congressional policy. * * * [Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, on S. 921 (Freedom of Information and Secrecy in Government), 85th Cong., 2d Sess., p. 583.]

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[2]The use of the term "particular records or parts thereof" in S. 1663 and S. 1666, 88th Cong., 1st Sess., at the beginning of the section in those bills containing the exemptions does not show that the nondisclosure statutes must refer to specific documents to be within exemption 3. The Freedom of Information Act, as enacted, does not contain that phrase, but refers to "matters" which are exempt. 5 U.S.C. 552(b). Moreover, the words "particular records or parts thereof" in S. 1663 and S. 1666 were not intended to limit the scope of the nondisclosure statutes which were to continue in effect. As S. Rep. No. 1219, on S. 1666, 88th Cong., 2d Sess., explained (p. 12):

> Exception No. 3 relates to matter which "is specifically exempted from disclosure by statute." This exception has been added to insure that S. 1666 is not interpreted to override specific statutory exemptions.

Unlike most of the other exemptions to the Freedom of Information Act, exemption 3 does not provide its own standards for confidentiality.[3] Instead, Congress incorporated by reference the large number of nondisclosure statutes it had adopted over many years. In other words, Congress decided that it would not attempt to re-examine or distinguish past legislative judgments that various government records were to be kept confidential under varying standards that Congress had concluded were appropriate for dealing with the particular materials involved.

In adopting that approach, however, Congress did not separately analyze or evaluate the individual nondisclosure statutes or decide whether particular provisions should be continued or modified. Nor did it intend that, in applying exemption 3, the courts should conduct the kind of inquiry which respondents propose and which several courts of appeals improperly have pursued (see petition for a writ of certiorari, pp. 16-17 and Br. 16, n. 16). The judicial inquiry under exemption 3 is at an end once the court concludes that a federal statute provides for (*i.e.*, requires or permits) confidential treatment of government records.

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[3]The only other comparable exemption is exemption 1, which covers matters "specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy." As we pointed out in our main brief (pp. 14-15), in *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, this Court rejected the theory that classification of material under an Executive Order which itself did not refer to specific documents was insufficient to bring those documents within the protection of exemption 1.

Respondents seek to distinguish *Mink* on the ground that the legislative history of exemption 1 expressly referred to the particular Executive Order (No. 10501) pursuant to which the documents in that case had been classified as top secret or secret (Br. 18-19). But that reference is parallel to the many references in the legislative history of exemption 3 to the large number of existing nondisclosure statutes which Congress intended to preserve in exemption 3.

Respondents do not explain precisely what standard they believe exemption 3 embodies. They state that their three criteria "should be examined in resolving questions as to the applicability of exemption 3" (Br. 10), and that the identification of specific documents is the "single most important test of an exemption 3 statute" (Br. 20), which "should be considered, along with other factors, in evaluating whether a statute comes within the third exemption" (Br. 22). Respondents thus suggest that in determining whether exemption 3 covers a particular nondisclosure statute, there is a considerable area of judgment in evaluating the weight to be given the three criteria.

As we have shown, this approach in applying exemption 3 is inconsistent with the congressional purpose of continuing the large number of nondisclosure statutes. Moreover, it would not provide any meaningful guidelines for government officials in passing upon the numerous requests they receive for disclosure of documents seemingly covered by exemption 3 or for the courts in deciding those cases.

2. Section 1104 of the Federal Aviation Act requires the Federal Aviation Administrator to withhold from public disclosure information obtained pursuant to the Federal Aviation Act, when in his judgment disclosure would adversely affect the interests of persons protesting disclosure and is not required in the public interest. Since the Administrator concluded that the SWAP reports involved in this case are required to be kept confidential under those standards, exemption 3 exempts those reports from disclosure.

Respondents contend (Br. 32-33) that Congress could not have intended to permit nondisclosure on the basis of the public interest standard in Section 1104, since one of the reasons for providing the specific exemptions in the Freedom of Information Act was to eliminate the practice under the prior public information section of the Ad-

ministrative Procedure Act by which government officials had withheld disclosure under a general public interest standard.[4] There is no inconsistency, however, between Congress eliminating a general standard of public interest as a basis for a general right of government officials to withhold records, and retaining specific nondisclosure statutes in which Congress gave those officials explicit authority to maintain confidentiality upon their evaluation that the public interest required it in a particular situation. For the latter statutes reflected a particularized legislative judgment that in a particular situation it was appropriate for the designated official to decide whether disclosure would be in the public interest. Under the Administrative Procedure Act, however, all government officials could refuse disclosure whenever they concluded that the subject "involved (1) any function of the United States requiring secrecy in the public interest * * * " (5 U.S.C. (1964 ed.) 1102; see *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 79).

There is no indication that Congress focused upon or was aware of the precise variations among the different standards in the existing nondisclosure statutes, or that it intended to limit the continued effectiveness of such statutes to those that had more detailed or specific

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[4] That provision—Section 3 of the Administrative Procedure Act, 5 U.S.C. (1964 ed.) 1002—provided:

> Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency
>
> * * * * * *
>
> (c) Public Records.—Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found.

standards for nondisclosure than the frequently employed criterion of public interest.[5] To the contrary, the congressional design in exemption 3 was to continue the effectiveness of all existing statutes which specifically provided for nondisclosure (on whatever terms), but to end the practice by which government officials kept material confidential without specific authority to do so, on the ground that the public interest required it.

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[5] *E.g.*, 13 U.S.C. 302 (Secretary of Commerce may provide for the confidentiality of foreign commerce or trade information as he deems necessary or appropriate in the public interest); 15 U.S.C. 78x (the Securities and Exchange Commission, after an objection, may make available information filed with it only when disclosure is in the public interest); 38 U.S.C. 3301(6) (information pertaining to a Verterans Administration claim may not be disclosed to any person requesting the information except upon a determination by the Administrator, with approval of the President, that the public interest warrants or requires publication; 47 U.S.C. 412 (Federal Communications Commission may, in the public interest, keep confidential foreign radio communication agreements if publication would place American companies at a competitive disadvantage); 49 U.S.C. 913 (Interstate Commerce Commission shall not disclose contracts between a contract carrier and shipper except as part of a record of a formal proceeding where consistent with the public interest).

Section 1104 of the Federal Aviation Act is a statute which "specifically exempted" the material which it covers from disclosure, because it is one of the many statutes authorizing nondisclosure which Congress intended to preserve in exemption 3.[6]

CONCLUSION

For the foregoing reasons and those set out in our main brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

APRIL 1975.

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[6]In our opening brief we pointed out (pp. 23-24) that Section 1104 was listed in an exhibit submitted to the Senate Committee Hearings in 1958 of "Statutory Provisions Restricting Disclosure of Government Information" which, the legislative history shows, Congress intended to preserve in exemption 3. Respondents argue (Br. 29-30) that because this compilation was submitted two days after the hearings closed, it is immaterial. The exhibit, however, is part of the record of congressional consideration of the problem of public information that resulted in the Freedom of Information Act, and as such is pertinent in interpreting the Act.

The fact, upon which respondents rely (Br. 28), that Section 1104 is not referred to in the 1960 compilation of nondisclosure statutes is irrelevant because, as pointed out in our main brief (p. 24), the compilation itself stated that it "does not purport to cover all of the Federal statutes." Finally, respondents argue (Br. 32) that the statements in the 1965 letters from the Civil Aeronautics Board to the House and Senate Committees that exemption 3 would cover Section 1104 are outweighed by the Board's statement two years earlier to the Senate Committee that "it may be argued" that exemption 3 "would have the effect of repealing sec. 1104 * * *." The Board's recognition that that argument could be made—as respondents are now doing—in no way undercuts the Board's subsequent statement of its view that exemption 3 would not have that effect.

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, ET AL. *v.* ROBERTSON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74–450. Argued April 15, 1975—Decided June 24, 1975

Respondents requested the Federal Aviation Administration (FAA) to make available Systems Worthiness Analysis (SWAP) Reports which consist of the FAA's analyses of the operation and maintenance performance of commercial airlines. Section 1104 of the Federal Aviation Act of 1958 permits the FAA Administrator, upon receiving an objection to public disclosure of information in a report, to withhold disclosure when, in his judgment, it would adversely affect the objecting party's interest or is not required in the public's interest. The Administrator declined to make the reports available upon receiving an objection from the Air Transport Association, which claimed that confidentiality was necessary to the effectiveness of the program. Respondents sued in the District Court seeking, *inter alia*, the requested documents. The District Court held that the documents were "as a matter of law, public and nonexempt" within the meaning of the Freedom of Information Act (FOIA). The Court of Appeals affirmed the judgment of the District Court "insofar as appellants rely on Exemption 3" of the FOIA. *Held:* The SWAP Reports are exempt from public disclosure under Exemption 3 of the FOIA as being "specifically exempt from disclosure by statute." Pp. 6–12.

(a) Exemption 3 contains no "built-in" standard as do some of the exemptions under the FOIA and the language is sufficiently ambiguous to require resort to the legislative history. That history reveals that Congress was "aware of the necessity to deal expressly with inconsistent laws," and, as indicated in its committee report, did not intend, in enacting the FOIA, to modify the numerous statutes "which restrict public access to specific

Syllabus

Government records." H. R. Rep. No. 1497, 89th Cong., 2d Sess., 10. Respondents can prevail only if the FOIA is read to repeal by implication all such statutes. To interpret "specific" as used in such committee reference as meaning that Exemption 3 applies only to precisely named or described documents, would be asking Congress to perform an impossible task and would imply that Congress had undertaken to reassess every delegation of authority to withhold information that it had made before the passage of the FOIA in 1966, a task that the legislative history clearly shows it did not undertake. Pp. 6–11.

(b) The broad discretion vested by Congress in the FAA under § 1104 to withhold information from the public is not necessarily inconsistent with Congress' intent in enacting the FOIA to replace the broad standard of the public disclosure section of the Administrative Procedure Act. Congress could appropriately conclude that the public interest in air transport safety was better served by guaranteeing confidentiality of information necessary to secure from the airlines the maximum amount of information relevant to safety, and Congress' wisdom in striking such a balance is not open to judicial scrutiny. P. 11.

162 U. S. App. D. C. 298, 498 F. 2d 1031, reversed.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEWART, J., filed an opinion concurring in the judgment, in which MARSHALL, J., joined. DOUGLAS and BRENNAN, JJ., filed a dissenting statement.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 74-450

Administrator, Federal Aviation Administration, et al., Petitioners, v. Reuben B. Robertson, III, et al. | On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June 24, 1975]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari [1] in this case in order to determine whether Exemption 3 [2] of the Freedom of Infor-

[1] 419 U. S. 1067 (1974).

[2] Section 552. *Public Information; agency rules, opinions, orders, records and proceedings.*

"(a) Each agency shall make available to the public information as follows:

. . . . . .

"(3) Except with respect to the recordings made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed shall make the records promptly available to any person.

. . . . . .

"(b) This section does not apply to matters that are—

. . . . . .

"(3) specifically exempted from disclosure by statute."

Section 552 was amended by the 1974 Amendments to the FOIA Act, Pub. L. 93-502, 88 Stat. 1561. Prior to the amendments, § 552 (a)(3) read, in pertinent part:

"Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules

mation Act, 5 U. S. C. § 552 (a)(3), permits nondisclosure to respondents of certain reports in the files of the Federal Aviation Administration. This exemption provides that material need not be disclosed if "specifically exempted from disclosure by statute." The reports are known as Systems Worthiness Analysis Program Reports (SWAP).[3] They consist of analyses made by representatives of the FAA concerning the operation and maintenance performance of commercial airlines; oversight and regulation of air travel safety is the responsibility of the Federal Aviation Administration, 72 Stat. 775, 49 U. S. C. § 1421. The FAA claims the documents are protected from disclosure by virtue of § 1104 of the Federal Aviation Act of 1958, 72 Stat. 797, 49 U. S. C. § 1504.[4]

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stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person . . . ."

The amendments did not affect exemption 3 of the Act, 5 U. S. C. § 552 (b)(3).

[3] The SWAP program is set forth in the Federal Aviation Administration's Systems Worthiness Analysis Program Handbook, 8000.3B (reprinted November 1970) (App. 44–11). A revised version SWAP Handbook is contained in FAA Order 8000.3C, April 14, 1972. (With subsequent changes.) See also affidavit of FAA Administrator Shaffer, App. 40.

[4] Section 1104 of the Federal Aviation Act of 1958, 72 Stat. 797, 49 U. S. C. § 1504, provides:

"Any person may make written objection to the public disclosure of information contained in any application, report, or document filed pursuant to the provisions of this chapter or of information obtained by the Board or the Administrator, pursuant to the provisions of this chapter, stating the grounds for such objection. Whenever such objection is made, the Board or Administrator shall order such information withheld from public disclosure when, in their judgment, a disclosure of such information would adversely affect the interests of such person and is not required in the inter-

The facts of the case, in its present posture,[5] are quite simple. During the summer of 1970, in connection with a study of airline safety being conducted by them, the respondents, associated with Center for the Study of Responsive Law, requested that the FAA, petitioner, make available certain Systems Worthiness Analysis Program Reports. The FAA declined to produce the documents. In accordance with established procedures adopted by the FAA, the respondents then filed timely notice of administrative appeal in August 1970. Several months later, while this administrative appeal was pending, the Air Transport Association, on behalf of its airline members, requested that the FAA make no public disclosure of the SWAP reports. The Association noted that, in a prior memorandum of its own staff, the FAA had pointed out that "the SWAP program requires a cooperative effort on the part of the company and FAA if it is to work effectively," and argued that: "the present practice of nonpublic submissions, which includes even tentative findings on opinions as well as certain factual material, encourages a spirit of openness on the part of airline management which is vital to the promotion of

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ests of such person and is not required in the interest of the public. The Board or Administrator shall be responsible for classified information in accordance with appropriate law: *Provided,* That nothing in this section shall authorize the withholding of information by the Board or Administrator from the duly authorized committees of the Congress."

[5] The respondents had also sought disclosure of Mechanical Reliability Reports, which are daily reports of mechanical malfunctions submitted to the FAA by the aircraft companies. On January 11, 1972, the Administrator determined that he would permit the disclosure of such documents received after April 18, 1972. The District Court's subsequent order in this case, on November 8, 1972, ordered disclosure of these documents received prior to that date. The petitioner has not contested this aspect of the District Court's order either on appeal to the Court of Appeals nor in his petition for writ of certiorari to this Court.

aviation safety . . . the paramount consideration of the airlines and the government alike in this area." In February 1971, the FAA formally denied respondents' request for the SWAP reports. It took the position that the reports are exempt from public disclosure under 5 U. S. C. § 552 (b)(3), the section at issue here; that section provides material need not be disclosed under the Freedom of Information Act when that material is specifically exempted from disclosure by statute. The FAA noted that § 1104 of the Federal Aviation Act, 72 Stat. 797, 49 U. S. C. § 1504, permits the Administrator to withhold information public disclosure of which, in his judgment, would adversely affect the interest of the objecting party and is not required to be disclosed in the interest of the public. The FAA also based its denial of this data on the exemption for intra-agency memoranda (5 U. S. C. § 552 (b)(5)), the exemption for investigatory files compiled for law enforcement purposes (5 U. S. C. § 552 (b)(7)), and, finally, the exemption for documentation containing trade secrets and commercial or financial information of a privileged or confidential nature (5 U. S. C. § 552 (b)(4)). The FAA's answer also explained its view of the need for confidentiality in SWAP reports:

> "The effectiveness of the in-depth analysis that is the essence of SWAP team investigation depends, to a great extent, upon the full, frank and open cooperation of the operator himself during the inspection period. His assurance by the FAA that the resulting recommendations are in the interest of safety and operational efficiency and will not be disclosed to the public are the major incentives impelling the operator to hide nothing and to grant free access to procedures, systems of operation, facilities, personnel, as well as management and operational records

in order to exhibit his normal course of operations to the SWAP inspectors."

Respondents then sued in the District Court, seeking, *inter alia*, the requested documents. The District Court held that "the documents sought by the plaintiffs . . . are as a matter of law, public and nonexempt within the meaning of 5 U. S. C. 552, and the plaintiffs are entitled to judgment . . . as a matter of law."

A divided Court of Appeals affirmed the judgment of the District Court "insofar as appellants rely on Exemption 3," but remanded the case for consideration of other exemptions which the Federal Aviation might wish to assert. — U. S. App. D. C. —, 498 F. 2d 1031 (1974). Examining first what it felt was the ordinary meaning of the language of Exemption 3, the Court of Appeals held that its language required the exempting statute relied on to specify or categorize the particular documents it authorizes to be withheld. Because § 1104 delegated "broad discretionary power" under a "public interest" standard, it was held not within the scope of Exemption 3. The Court of Appeals distinguished this Court's decision in *Environmental Protection Agency* v. *Mink*, 410 U. S. 73 (1973), on the ground that the exemption involved in that case was construed to be a specific reference by Congress to a definite class of documents, namely those that must be kept secret " 'in the interest of national defense or foreign policy,' " 498 F. 2d, at 1033. The Court of Appeals read the Act as providing a comprehensive guide to congressional intent. One of the Act's major purposes was seen as intending to eliminate what it characterized as vague phrases such as "in the public interest" or "for good cause" as a basis for withholding information. Under these circumstances, the court concluded that § 1104 cannot be considered a

specific exemption by statute within the meaning of Exemption 3 of the Freedom of Information Act.

This case involves no constitutional claims, no issues regarding the nature or scope of "executive privilege," but simply the scope and meaning of one of the exemptions of the Freedom of Information Act, 5 U. S. C. § 552. *Environmental Protection Agency* v. *Mink, supra,* at 94 (concurring opinion of STEWART, J.). The Act has two aspects. In one, it seeks to open public records to greater public access; in the other, it seeks to preserve the confidentiality undeniably essential in certain areas of Government operations. It is axiomatic that all parts of an act "if at all possible, are to be given effect." *Weinberger* v. *Hynson, Wescott & Dunning,* 412 U. S. 609, 633 (1973). Accord, *Kokoszka* v. *Belford,* 417 U. S. 642, 650 (1974).

We have construed the Freedom of Information Act recently in *NLRB* v. *Sears, Roebuck & Co.,* — U. S. — (1975); *Renegotiation Board* v. *Grumman Aircraft Engineering Corp.,* — U. S. — (1975); *Renegotiation Board* v. *Bannercraft Clothing Co.,* 415 U. S. 1 (1974); *Environmental Protection Agency* v. *Mink, supra.* In *Mink, supra,* the Court set out the general nature and purpose of the Act, recognizing, as did the Senate committee report, that it is not " 'an easy task to balance the opposing interests . . .' " and "provide a 'workable formula' that 'balances, and protects all interests . . .' " *Id.,* at 80, quoting from S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965). Nothing in the Act or its legislative history gives any intimation that all information in all agencies and in all circumstances is to be open to public inspection. Because it considered the public disclosure section of the Administrative Procedure Act, 5 U. S. C. § 1002 (1964 ed.), inadequate, Congress sought to permit access to certain kinds of official information which

it thought had unnecessarily been withheld and, by the creation of nine explicitly exclusive exemptions, to provide a more workable and balanced formula that would make available information that ought to be public and, at the same time, protect certain information where confidentiality was necessary to protect legitimate governmental functions that would be impaired by disclosure. The exemptions provided by the Act, one of which we deal with here, represent the congressional judgment as to certain kinds of "information that the Executive Branch must have the option to keep confidential, if it so chooses," *id.*, at 80. The language of Exemption 3 contains no "built-in" standard as in the case of some of the other exemptions. The variety of constructions given its language by the courts of appeals,[6] are ample

[6] In *Evans* v. *Dept. of Transportation*, 446 F. 2d 821 (CA5 1971), the court held that 49 U. S. C. § 1504, the FAA statute in question here, was within the scope of Exemption 3. *Id.*, at 824. The same Court of Appeals, however, in an unpublished opinion, *Serchuk* v. *Weinberger*, 493 F. 2d 663 (CA5 1974), followed the Third Circuit in *Stretch* v. *Weinberger*, 495 F. 2d 639 (CA3 1974), in holding that 42 U. S. C. § 1306 (a)—requiring the confidentiality of all material obtained by the Secretary of Health, Education, and Welfare "except as the Secretary . . . may by regulations prescribe,"—was not within the scope of Exemption 3 because it neither "identifies some class or category of items that Congress considers appropriate for exemption," *id.*, at 640, nor at least, "sets out legislatively prescribed standards of guidelines that the Secretary must follow in determining what matter shall be exempted from disclosure." *Ibid.* Accord *Schechter* v. *Weinberger*, — U. S. App. D. C. —, 506 F. 2d 1275 (1974, MacKinnon, J., dissenting, at 498 F. 2d 1015). *In People of the State of California* v. *Weinberger*, 505 F. 2d 767 (CA9 1974), reached a contrary result in regard to 42 U. S. C. § 1306 (a) on the ground that the general nondisclosure mandate constituted "words of congressional exemption," *id.*, at 768 and thus the material was "specifically exempted . . . by statute." The Secretary merely had the authority "to relax the absolute prohibition established by Congress." *Ibid.* Cf. *Sears* v.

evidence that the relevant portions of the exemption are unclear and ambiguous, compelling resort to the legislative history. See *United States* v. *Donruss Co.*, 393 U. S. 297, 303 (1968). Cf. *United States* v. *Oregon*, 366 U. S. 643, 648 (1961).

That history must be read in light of the legislation in existence when the Act was passed; that history reveals "clear evidence that Congress was aware of the necessity to deal expressly with inconsistent laws." *Regional Rail Reorganizational Act Cases*, 419 U. S. 102, 129 (1974). Congress was aware, as it undertook a painstaking review, during several sessions, of the right of the public to information concerning the public business; it was aware that it was acting not only against the backdrop of the 1946 Administrative Procedure Act, *supra*, but on the basis of a significant number of earlier congressional decisions that confidentiality was essential in certain departments and agencies in order to protect the public interest. No distinction seems to have been made on the basis of the standards articulated in the exempting statute or on the degree of discretion which it vested in a particular Government officer. When the continued vitality of these specialized exempting statutes was raised by the views of various agencies,[7] the members of the committee consistently expressed the clear intention that these statutes would remain unaffected by the new Act. During the 1963 hearings, for example, Senator Long, Chairman of the Senate Subcommittee stated: "It should

Gottschalk, 502 F. 2d 122 (CA5 1972), finding sufficient specificity in the term "applications for patents" of 35 U. S. C. § 122 and in Rule 14 (a) and (b) of the Patent Office to satisfy even the objections of the *Stretch* Court and to bring 35 U. S. C. § 122 within the scope of Exemption 3.

[7] Note, Comments, on Proposed Amendments to Section 3 of the Administrative Procedure Act: The Freedom of Information Bill, 40 Notre Dame Law. 453 n. 254.

be made clear that this bill in no way limits statutes specifically written with the congressional intent of curtailing the flow of information as a supplement necessary to the proper functioning of certain agencies." [8] Indeed, some provisions [9] of bills which were not enacted could well have been construed as repealing all earlier legislation,[10] but such provisions were not included in the bill that was finally enacted. More specifically, when the Civil Aeronautics Board brought § 1104 to the attention of both the House and Senate Hearings of 1965, and expressed the agency interpretation that the provision was encompassed within Exemption 3,[11] no question was raised or challenge made to the agency view of the impact of that exemption. When the House Committee on

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[8] Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 88th Cong., 1st Sess., p. 6, statement of Senator Long, Chairman of the Subcommittee and sponsor of § 1666, which was not changed, in pertinent part, in the final enactment. See also Hearings before a Subcommittee of the House Committee on Government Operations on H. R. 5012 et al, 89th Cong., 1st Sess., p. 14, statement of Representative Moss, Chairman.

[9] Hearings before a Subcommittee of the House Committee on Government Operations on H. R. 5012 et al., 89th Cong., 1st Sess., p. 3; "All laws or parts of laws inconsistent with amendment made by the first section are hereby repealed."

[10] *Id.*, at 14, 20, 53.

[11] *Id.*, at 20. See also Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, on § 1160 et al., 89th Cong., 1st Sess., p. 366. The statute also was specifically listed on an exhibit of "exempt statutes" submitted during the 1958 Hearings before the Subcommittee on Constitutional Rights of the Senate Subcommittee on the Judiciary on § 921, 85th Cong., 2d Sess., pp. 985–987, 997. Subsequent lists—specifically not claiming to be exhaustive—include similar statutes. See House Committee Print, Federal Statutes on the Availability of Information, 86th Cong., 2d Sess., listing 26 U. S. C. § 6104 (a) and 15 U. S. C. § 78x (b). See generally Davis, Administrative Law Treatise, § 3A. 18 (1970) (Supp.).

Government Operations focused on Exemption 3, it took note that there are "nearly 100 statutes or parts of statutes which restrict public access to specific Government records. *These would not be modified* by the public records provisions of S. 1160." H. R. Rep. No. 1497, 89th Cong., 2d Sess., 10. (Emphasis added.)

The respondents can prevail only if the Act is to be read as repealing by implication all existing statutes "which restrict public access to specific public records." *Ibid.* The term "specific" as there used cannot be read as meaning that the exemption applies only to documents specified, *i. e.*, by naming them precisely or by describing the category in which they fall. To require this interpretation would be to ask of Congress a virtually impossible task. Such a construction would also imply that Congress had undertaken to reassess every delegation of authority to withhold information which it had made before the passage of this legislation—a task which the legislative history shows it clearly did not undertake.

Earlier this Term, MR. JUSTICE BRENNAN, speaking for the Court in the *Regional Rail Reorganizational Cases*, 419 U. S. 102 (1974), noted that "repeals by implication are disfavored," *id.*, at 133, and that, when courts are confronted with statutes "'capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" *Id.*, at 133–134, quoting *Morton* v. *Mancari*, 417 U. S. 535, 551 (1974). As we have noted, here, as in the *Regional Rail Reorganization Act Cases, supra*, there is "clear evidence that Congress was aware of the necessity to deal expressly with inconsistent laws," *id.*, at 129. To spell out repeal by implication of a multitude of statutes enacted over a long period of time, each of which was separately weighed and considered by Congress to meet an identified need, would be a more unrea-

sonable step by a court than to do so with respect to a single statute such as involved in the *Regional Rail Reorganization Act Cases, supra.* Congress' response was to permit the numerous laws then extant allowing confidentiality to stand; it is not for us to override that legislative choice.

The discretion vested by Congress in the FAA, in both its nature and scope, is broad. There is not, however, any inevitable inconsistency between the general congressional intent to replace the broad standard of the former Administrative Procedure Act and its intent to preserve, for air transport regulation, a broad degree of discretion on what information is to be protected in the public interest in order to insure continuing access to the sources of sensitive information necessary to the regulation of air transport. Congress could not reasonably anticipate every situation in which the balance must tip in favor of nondisclosure as a means of insuring that the primary, or indeed sole-source of essential information, would continue to volunteer information needed to develop and maintain safety standards. The public interest is served by assuring a free flow of relevant information to the regulatory authorities from the airlines. Congress could appropriately conclude that the public interest was better served by guaranteeing confidentiality in order to secure the maximum amount of information relevant to safety. The wisdom of the balance struck by Congress is not open to judicial scrutiny.

It was inescapable that some regulatory authorities be vested with broad, flexible discretion, the exercise of which was made subject to continuing scrutiny by Congress. Following passage of the Act, "general oversight into the administration of the Freedom of Information Act was exercised by the House Foreign Operations and Government Information Subcommittee and the Senate

Subcommittee on Administrative Practice and Procedure." House Rep. No. 92–1419, "Administration of the Freedom of Information Act" 92d Cong., 2d Sess., 3–4. It is not insignificant that this overall scrutiny of the Act in 1972 brought no change in Exemption 3. Indeed, when Congress amended the Freedom of Information Act in 1974, it reaffirmed the continued vitality of this particular Exemption, covering statutes vesting in the agencies wide authority. Sen. Rep. No. 93–1200, Conference Report, Freedom of Information Act Amendments, 12; H. R. Rep. No. 93–1380, Conference Report, Freedom of Information Act Amendments, 12.

Moreover, Congress amended the Act in 1974 to require that all agencies submit to each House, on an annual basis, "the number of determinations made by such agency not to comply with requests for records . . . and the reasons for each determination." Pub. L. 93–502, 88 Stat. 1564. In light of this continuing close scrutiny, we are bound to assume that Congress exercised an informed judgment as to the needs of the FAA and that it was persuaded as to the necessity, or at least of the practical compatibility, of both statutes.

Reversed.

MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN dissent for the reasons given by Judge Fahy's opinion for the Court of Appeals, 498 F. 2d 1031 (1974).

SUPREME COURT OF THE UNITED STATES

No. 74-450

Administrator, Federal Aviation Administration, et al., Petitioners, v. Reuben B. Robertson, III, et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June 24, 1975]

MR. JUSTICE STEWART, with whom MR. JUSTICE MARSHALL joins, concurring in the judgment.

Exemption 3 of the Freedom of Information Act provides for nondisclosure of "matters that are specifically exempted from disclosure by statute." Section 1104 of the Federal Aviation Act specifically provides that when "any person" objects to the public disclosure of certain information, "the Board or Administrator shall order such information withheld from public disclosure when, in their judgment, a disclosure of such information would adversely affect the interests of such person and is not required in the interest of the public." The Court today rules that information may be withheld under § 1104 by reason of Exemption 3.

Legislation of unusually broad scope often reflects reconciliation of conflicting values and policies. On occasion, therefore, particular provisions of such legislation may seem at odds with its basic purpose. But when the statutory language is relatively clear and the legislative history casts no serious doubt, the only appropriate judicial course is to give effect to the evident legislative intent.

So it is here. The Freedom of Information Act was enacted in order to impose objective and easily applicable statutory disclosure standards in place of relatively

amorphous standards such as the "public interest," behind which the most self-serving motives for nondisclosure of information could be concealed. *Environmental Protection Agency* v. *Mink*, 410 U. S. 73, 79 (1973); and see, *e. g.*, S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965). But it seems equally clear that Congress intended to leave largely undisturbed existing statutes dealing with the disclosure of information by specific agencies. See, *e. g.*, H. R. Rep. No. 1497, 89th Cong., 2d Sess., 10 (1965).

Simply stated, the respondent's position is that to allow administrative discretion under a general "public interest" standard to determine whether information shall be disclosed to the public is inconsistent with the general thrust of the Freedom of Information Act. For this Court to accept that position, it must accept its inevitable corollary: that by enacting the Freedom of Information Act, Congress intended to repeal, by implication alone, those statutes that make disclosure a matter of agency discretion. It simply is impossible fairly to discern any such intention on the part of Congress.[1] There is no evidence of such an intention in either the

[1] A substantial number of statutes leave disclosure of various documents to the discretion of an administrative officer. Examples are 42 U. S. C. § 1306 (a), which prohibits disclosure of "any . . . report . . . obtained at any time by the Secretary of Health, Education, and Welfare . . . except as the Secretary . . . may by regulations prescribe"; 35 U. S. C. § 122, which provides that information in patent applications cannot be made public by the Patent Office "unless necessary to carry out the provisions of any Act of Congress or in such special circumstances as may be determined by the Commission"; and 38 U. S. C. § 3301, which states that all files, records, and other papers pertaining to any claim under any law administered by the Veterans' Administration are not to be disclosed, except that "[t]he Administrator may release information . . . when in his judgment such release would serve a useful purpose."

statutory language or the legislative history, and there are strong intimations to the contrary. See *ante*, at 8–9.

Our role is to interpret statutory language, not to revise it. As matters now stand, when an agency asserts a right to withhold information based on a specific statute of the kind described in Exemption 3, "the only question "to be determined in a district court's *de novo* inquiry is the factual existence of such a statute, regardless of how unwise, self-protective, or inadvertent the enactment might be."[2] *Environmental Protection Agency* v. *Mink*, 410 U. S. 73, 95 n. (concurring opinion).

On this basis, I concur in the judgment of the Court.

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[2] It should be noted, however, as the Solicitor General has pointed out, that under 49 U. S. C. § 1486, judicial review of an order of nondisclosure under 49 U. S. C. § 1104 is available in the Court of Appeals.

END OF CASE